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1. Would you like to enter the text online or upload a file containing the pleading?

See attached pleading text document

2. Does your pleading assert facts that you know from your personal knowledge?

Yes

3. Do you declare, under penalty of perjury, that the facts stated in this pleading are true and correct?

Yes
MEMORANDUM FOR THE UNITED STATES DEPARTMENT OF LABOR

SUBJECT: Brief in Response to Jurisdictional Order of 23 February
Docket No. DE-1221-16-0198-W-1

Please note that this PDF document contains bookmarks as required by the Board’s policies.

Response to Jurisdictional Order
This brief is submitted in response to the ORDER ON JURISDICTION AND PROOF REQUIREMENTS dated 23 February 2016. The order instructed me to provide:

(1) your protected disclosure(s) or activity(ies); (2) the date(s) you made the disclosure(s) or engaged in the activity(ies); (3) the individual(s) to whom you made any disclosure(s); (4) why your belief in the truth of any disclosure(s) was reasonable; (5) the action(s) the agency took or failed to take, or threatened to take or fail to take, against you because of your disclosure(s) or activity(ies); (6) why you believe a disclosure or activity was a contributing factor to the action(s); and (7) the date of your complaint to OSC and the date that it notified you it was terminating its investigation of your complaint, or if you have not received such notice, evidence that 120 days have passed since you filed your complaint with OSC.

I have been engaged in a three-year whistleblowing situation with my employer: The United States Department of Defense (DoD) - Defense Contract Audit Agency (DCAA). The evidentiary record of this matter in my possession alone includes tens of thousands of pages of documents, and approximately two thousand e-mails. I have spent over a thousand hours of official time engaged in whistleblowing activities as part of my official duties – something that has never before occurred in the history of the Federal Government. As a result, I have endeavored to limit the documentation in this appeal to that immediately necessary. However, anything in the complete record is of course available should the Board require it.

I was placed in a unique position to make these disclosures for three reasons. First, I do not intend to remain in Federal service as a career, but instead to enter the legal profession. As such, threats against my career did not have the same effect as they did upon career employees who have years of retaliation and abuse to look forward to when making disclosures. Second, I have a record of commitment to the law and of not making frivolous allegations sufficient that the Congress gives my views great weight when I cry ‘wolf’. Third, I am highly qualified forensic

1 And, indeed, that was impossible prior to the Whistleblower Protection Enhancement Act of 2012
2 Although some documents are protected from disclosure to my employer by rule, law and regulation.
3 Such as my former supervisor and manager
accountant and fraud investigator\(^4\), and ensured that I had a bullet-proof evidentiary record to support my disclosures.

My longest running series of disclosure relates to an audit I began in 2013 of the National Ecological Observatory Network, Inc. (NEON) – the largest Federally-funded climate change research project (a politically sensitive issue of the highest order). I determined in May 2013 that NEON had committed multiple violations of rule, law and regulation including the expenditure of over $1.8 million in taxpayer funds on lobbying, luxury travel, parties, alcohol, and other illegal entertainment – and also that its control of taxpayer money was so poor that it could run tens of millions of dollars over budget without warning. My supervisor and manager concurred fully with my findings. Senior DCAA management unlawfully ordered me and my immediate superiors to cover-up up the wrongdoing, beginning at a meeting on 2 April 2014.\(^5\) When we refused, they threatened my supervisor and manager into withdrawing their support.\(^6\)

I refused to give into the threats, and instead disclosed my findings to the Office of Special Counsel, several Inspectors General,\(^7\) and the Congress. I also disclosed the unlawful cover-up to those same entities, and to my chain of command (including the individuals I was accusing within DCAA). My allegations against NEON were substantiated by the National Science Foundation (which oversaw NEON), its Inspector General, and the Congress in early 2015. In April 2015 the White House Office of Management and Budget ordered all Federal agencies to ensure that the unlawful expenditures at NEON did not occur at any other Government contractor or grantee in the future.\(^8\) In September 2015 the National Science Foundation reported to Congress that my findings regarding NEON’s control of taxpayer funds were all too accurate, and the project had run at least $80 million over budget. As a result, NEON’s current and future grants (the project was to run at least thirty years), with a value of approximately $3.5 billion, were terminated on 11 December 2015\(^9\) – the largest for-cause termination of Federal contracts or grants due to whistleblowing in the history of the United States.

This has caused significant tension with my employer because it was publically humiliated in taking NEON’s (indefensible) side, and also because Congress effectively banned it from performing audits of any non-Defense client from 2016 onward\(^10\) – which has caused a

\(^4\) One of the most qualified in the Federal Service, as documented at: https://commons.wikimedia.org/wiki/File:Resume_-_J_Kirk_McGill_2015-01-05.pdf

\(^5\) A recording of which is at issue in this appeal.

\(^6\) Events that were included in the 2 April 2014 recording.

\(^7\) Including both the National Science Foundation Inspector General, and the Department of Defense Inspector General.


significant reduction (in the tens of millions of dollars) to its budget. As a result of this tension, it has engaged in a systematic and long-running campaign of retaliation and public defamation of my character beginning in January 2014\(^1\), and continuing to this day.

As discussed in the brief supporting the appeal dated 21 February 2016, I have limited this appeal to the events in December 2015 to February 2016 directly leading to the five-day suspension at issue in this appeal; however, the events in the case prior to December 2015 as summarized above are relevant to establish background, and to support my contention that DCAA is engaged in a pattern of retaliatory conduct that culminated in the five-day suspension. It is also relevant should the Board determine that disciplinary action against the responsible officials is appropriate, since their pattern of misconduct is certainly relevant. Therefore, without going into the overall situation in great detail within the brief itself, I will make references to the events prior to December 2015.

(1) The Protected Disclosures

I made disclosures over the past three years involving seven areas: a) the unlawful activities of NEON; b) the unlawful activities of the Colorado School of Mines (CSM); c) DCAA’s unlawful orders to cover-up the wrongdoing by NEON and CSM and issue false audit reports in both cases; d) DCAA’s lack of independence when conducting audits in violation of rule and regulation that permitted these cover-ups to occur; e) the unlawful retaliation perpetrated by DCAA officials against me in reprisal for making the aforementioned disclosures (which implicated the Agency and its management in criminal, civil, and administrative misconduct); f) the violations of the Rehabilitation Act by DCAA between July 2015 and the present related to my medical conditions caused by its retaliation and the hostile and unhealthy working environment it created; and, g) the retaliation by DCAA for making the disclosures in f) above.

Further, I filed a complaint with the Office of Special Counsel (OSC) related to e) and g) beginning on 5 May 2015.

I began the EEOC complaints process related to f) and g) above on 2 February 2016.

A summary disclosure containing a complete chronological listing of events between early 2013 and April 2015 (including the disclosures during that period) is attached hereto as Appendix E. The final written disclosure related to d) above is attached hereto as Appendix F.

Information about the NEON situation and the retaliation related to the same is publicly available\(^12\), and my identity is well known within DCAA because I made the disclosures

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\(^{10}\) Based on provisions in the 2016 National Defense Authorization Act, which while purportedly based on DCAA’s backlog of work, was within the Government also intended to punish DCAA for the NEON debacle

\(^{11}\) When DCAA Deputy Director Anita Bales, now the Director of DCAA, personally called me at work, asked for a private telephone conversation without my supervisor present, and threatened my employment if I refused to cover up my findings related to NEON. This conversation is documented in Appendix E.
pursuant to my official duties, and publically since I was named as the source of the NEON disclosures by Congress.\(^\text{13}\)

(2) **The Dates of the Disclosures**  
The dates of the disclosures in a) through e) above are included in the chronological summary referenced above. The dates of the disclosures under f) and g) above relevant to this appeal include 26 January 2016 and 1, 2, 3, 5, and 12 February 2016 and are discussed in detail in the brief supporting the initial appeal filing. Copies of the written disclosures (all emails) related to f) and g) are attached hereto as Appendix D. They are specifically:

- An email dated 26 January 2016 discussing the corrective action of that date and disclosing that the corrective action violated rule, law and/or regulation (including the Whistleblower Projection Act).

- An email dated 2 February 2016 discussing the termination of the interim accommodations and disclosing that said termination violated rule, law and/or regulation (specifically the Rehabilitation Act and its supporting rules and regulations).

- An email also dated 2 February 2016 discussing the recording of my call with Mr. Edwards on 1 February, providing a partial copy and transcript of the recording, and disclosing that Mr. Edward’s statements during the conversation constituted discrimination and retaliation in violation of the Rehabilitation Act. This email was also forwarded to DCAA EEO Director Hepperle on 5 February 2016 following my telephone call with Ms. Taylor, and was also provided to Mr. Eve (as evidenced by its inclusion in the proposed personnel action) sometime thereafter by one of those individuals.

\(^{12}\) See, e.g.


\(^{13}\) [http://docs.house.gov/meetings/SY/SY00/20141203/102771/HHRG-113-SY00-20141203-SD004.pdf](http://docs.house.gov/meetings/SY/SY00/20141203/102771/HHRG-113-SY00-20141203-SD004.pdf)
• An email dated 5 February 2016 discussing DCAA’s shift in position on the interim accommodation issue and disclosing that its actions violated rule, law or regulation (specifically the EEOC’s binding guidance on the reasonable accommodation process pursuant to the Rehabilitation Act).

(3) The individuals to whom I made the disclosures
The individuals to whom I made the disclosures in a) through e) above are included in the summary disclosure attached as Appendix E, and those individuals include all of the individuals and groups listed below with the exception of the DCAA EEO Office which was not involved in my disclosures prior to February 2016.

I made the disclosures referenced above to the following:

• My direct chain of command including: Supervisory Auditor Colin Eve, FAO Manager Brett Rogers, Regional Audit Manager Kevin Hampton, Regional Director Diana Graff, and DCAA Director Anita Bales. Prior to October 2014 my supervisor was Michael Quant and my FAO Manager was Allen Jones (who are the former supervisor and manager referred to above).


• Employees of the DCAA EEO Office including: EEO Director Phillip Hepperle, EEO Office Pamela Johnson, EEO Officer Anthony ‘Tony’ Edwards and EEO Officer Rachel Taylor.

• The DCAA General Counsel (acting) David Hoffman, and his predecessor Ms. Chaddick.

• Staff members for the United States House of Representatives Committee on Science, Space and Technology and the United States Senate Committee on the Judiciary as well as several other committees of the House and Senate.

• The public, via several nongovernmental organizations.

The individuals in the first four bullet points (other than my previous supervisor and manager) are listed as addressees in the emails attached hereto as Appendix D.

(4) Evidence that my belief in the truth of the disclosures was reasonable
The evidence supporting the disclosures in a) through d) above are included in the summary cited above and attached hereto as Appendix E.
The original disclosure for e) above is attached hereto as Appendix F and contains the supporting documentation demonstrating my belief in the truth of the disclosures.

I note again that my NEON disclosures were substantiated, as discussed above. The remainder are under investigation by Congress and the Department of Defense Inspector General.

The disclosures directly at issue in this appeal alleged that on or about 29 January 2016 Mr. Eve and Mr. Edwards unlawfully revoked interim reasonable accommodations that had been extended to me on 1 July 2015, and that this unlawful action was motivated by discriminatory and retaliatory animi. The evidence supporting the allegations in the disclosures includes: 1) the citations of rule, law and regulation in the disclosure emails attached hereto as Appendix D, which establish significant evidence in support of the proposition that DCAA’s actions violated rule, law, and/or regulation; 2) the statements by Mr. Edwards in our telephone conversation on 1 February 2016 that support the allegation in the disclosures that Mr. Edwards and Mr. Eve manufactured a pretext to justify terminating the interim accommodations, and that the actual reasons were discriminatory and retaliatory animi (my electronic recording of this conversation submitted as proof of the allegations in the disclosures is the explicit basis for the proposed personnel action); and, 3) DCAA reversed Mr. Eve’s 29 January Order in apparent recognition that Mr. Eve’s order was unlawful and the interim accommodations are still in place as of this date.

(5) The actions the agency took or proposes to take against me because of the disclosures & activities

The actions the Agency took or proposes to take against me related to the disclosures in a) through e) above are included in Appendix E (coded in red). The proposed personnel action related to f) and g) above is the five-day suspension and the threat of further personnel action should I violate Mr. Eve’s 26 January 2016 order and make (or reveal the existence of) any further electronic recordings. On that latter note, Mr. Eve states in the proposed personnel action that I committed both a first and second offense of insubordination by making the 1 February recording, and allegedly making the 5 February recording. According to the table of discipline provided with the Agency’s response to my request for stay, the punishment for a third offense related to insubordination for a “Failure to follow standing procedural and substantive policies as well as oral and written instructions” is between a 14-day suspension and removal from Federal service, while the punishment for a third offense related to insubordination for “Intentional disregard of authority or refusal to comply with orders or directives” is removal from Federal service. Therefore, the Agency is clearly threatening to impose significant discipline should it discover I previously made (or made in the future) a recording during my whistleblower activities (or otherwise). Both the five-day suspension and the implicit and explicit threat of further disciplinary action are both properly before the Board.

(6) Evidence that the disclosures were a contributing factor to these actions

FOR OFFICIAL USE ONLY
This evidence, as related to the disclosures in a) through e) above is discussed in the summaries attached as Appendix E hereto. I do want to draw your attention particularly to the events beginning on 18 September 2014 documented therein as that is one of the more egregious examples of retaliation that was substantiated by the DCAA Office of the Inspector General.

Further, with regard to the instant proposed personnel action, there is extensive discussion of this issue in the brief supporting the initial appeal. However, I do want to take the opportunity to discuss two contentions put forth in the brief in further details here.

First, it is worthy of repetition that Mr. Eve admits in the proposed personnel action that he only learned of the recording(s) from my verbal disclosure to him on 3 February, from my verbal and written disclosures to Ms. Johnson on 2 February (wherein I also asked to file an EEOC Complaint) when Ms. Johnson told him about those disclosures, and my verbal disclosure to Ms. Taylor on 5 February, when she told Mr. Eve about that disclosure. In short, Mr. Eve admits that the sole basis for the proposed personnel action was the disclosures of 2, 3 and 5 February. Mr. Eve includes signed statements by Mr. Johnson and Ms. Taylor verifying that I made the disclosures to them, as well as a copy of the transcript I sent Ms. Johnson (along with the recording) discussing the violations of the Rehabilitation Act proven by the recording. This is direct evidence that the disclosures were the sole cause of the proposed disciplinary action, and the proposed personnel action could not nor would not have occurred but for the disclosures of 2, 3 and 5 February because I only made the recording to provide evidence in the disclosures, and Mr. Eve only learned of the recording(s) directly from the disclosures, and had no way of knowing that the recordings existed outside of the protected disclosures.

Second, I argue in the initial brief that the two alleged violations of DCAA’s anti-recording policy after Mr. Eve’s 26 January 2016 corrective action order could not be violations because the policy only applies in the “work environment”, and I was not in the working environment during either conversation. To add to the arguments in the initial brief, I note that recording is permissible under the policy if:

1. All parties to the conversation to be recorded have been informed that the conversation they are about to have will be recorded

2. All parties to the conversation consent to be recorded; and

3. The recording device is in plain view of all participants to the conversation at all times

(emphasis added).

The “in plain view” requirement clearly supports my contention that the policy only applies in the “work environment”, and that the “work environment” does not include, at
the very least, phone calls from my personal residence and on my personal telephone on a non-work day. Indeed, the “work environment” does not appear to include telephone conversations at all given that compliance with the “in plain view” requirement is impossible in a telephone conversation unless all the parties to the call are in the same room. As such, the policy clearly does not apply to either of the allegations in the proposed personnel action, which are unequivocally distinguishable from the instance cited in the 26 January corrective action because that instance did occur in the “work environment” during an in-person meeting in a DCAA facility, during official duty time. In other words, the recording cited in the corrective action is readily distinguishable from the recording cited in the proposed personnel action.

Therefore, DCAA’s use of the policy to justify the proposed personnel action is misplaced – a fact which provides strong evidence that the alleged policy violation is merely a pretext for retaliation under the Whistleblower Protection Act. This is not the first time DCAA has attempted to misuse a policy to cover for retaliation against me. Several previous instances are discussed in Appendix E. It is worthy of note that DCAA did not prevail in every single previous attempt, and my disciplinary record remained clean until 26 January 2016.

At bottom, the timing of the disciplinary action (within days of the disclosures at issue), the direct evidence that the disclosures caused the personnel action, and DCAA previous retaliatory conduct strongly support my contention that the proposed personnel action is retaliatory in violation of the Whistleblower Protection Act.

(7) Date of my complaint to OSC and evidence that 120 days have passed since the complaint was filed
Attached hereto as Exhibit B is a letter from OSC confirming that my complaint was filed on 5 May 2015, that the five day suspension is included in that complaint, and that more than 120 days have passed since the complaint was filed.

Discussion of the Board’s Jurisdiction
The initial appeal asserted that the Board had jurisdiction because more than 120 days had passed since my complaint was filed with OSC on 5 May 2015. However, it is arguable that the Board does not have jurisdiction until 120 days have passed since the particular personnel action at issue was reported to OSC, regardless of whether OSC includes the personnel action in an old complaint, or creates a new one. Therefore, the issue of jurisdiction was unsettled at the time of initial filing and the appellant may have inadvertently filed prematurely – for I apologize to the Board if that was indeed the case.

Fortunately, the Board unquestionably has jurisdiction when OSC terminates its investigation into a complaint without recommending corrective action. OSC notified me on 14 January 2016 in a letter (attached hereto as Appendix A) that pursuant to 5 U.S.C. § 1214(b)(i) it would terminate the complaint if an extension of time was not granted pursuant to 5 U.S.C. § 1214(b)(2). I granted a preliminary extension, but after the instant personnel action was imposed I learned from OSC that it could be a year or more before it would complete the investigation.
and recommend corrective action due to significant understaffing, the unexpected death of senior OSC official, and a significant backlog of complaints predating my own. Given my health and financial situation, which has already suffered significantly due to DCAA’s long-running campaign of retaliation, waiting a year for resolution was simply not feasible. Therefore, I informed OSC on 23 February that no further extension was authorized. OSC informed me on 25 February that it was terminating the investigation. The letter from OSC, confirming that the investigation was terminated, is attached hereto as Appendix C. Note that the investigation was terminated purely because of the statutory time limitations, not because my allegations lacked merit. A letter from OSC confirming that the instant five-day suspension was included in the terminated investigation is also included in Appendix C.

As such, I have properly pursued the violations of the Whistleblower Protection Act, including the five-day suspension, to OSC pursuant to 5 U.S.C. § 1214(a)(3). OSC has terminated the investigation into my whistleblower reprisal allegations\(^{14}\) without seeking corrective action due to its failure to complete the overall investigation within 240 days of filing as required by law. Therefore, the Board now has jurisdiction over all matters included in that complaint\(^{15}\) pursuant to 5 U.S.C. § 1214(a)(3)(A)(i). The instant appeal was filed within the time limitations of 5 U.S.C. § 1214(a)(3)(A)(ii).

The Board’s precedents establish that an appeal should ordinarily proceed to a judgement on the merits if the Board gains jurisdiction while the case is on appeal, even if it did not have jurisdiction at the time of the initial filing.\(^{16}\) Therefore, even if the Board did not have jurisdiction at the time of initial filing, the Board unquestionably has jurisdiction as of this date, and I request that the Board so rule and proceed to a hearing on the merits.

I also note that the Board now unquestionably has jurisdiction to grant the stay requested on 21 February.

\(^{14}\) Including the five-day suspension at issue in the instant appeal, per OSC’s statements in Appendix C, and the prior issues as discussed (up until 27 April 2015) in Appendix E.

\(^{15}\) Ibid.

\(^{16}\) See, e.g. Price v. Department of Veterans Affairs, 105 M.S.P.R. 126, ¶ 10 (2007)
I, Joshua Kirk McGill do hereby declare:

I declare under penalty of perjury under the laws of the United States of America that the foregoing (and the documents of my creation attached hereafter) is true and correct.

Executed on Friday 26 February 2016

Joshua Kirk McGill
CPA, CFE, CIA, CMA, CISA, Cr.FA, CGAP, CGMA; M.S. Acct.
Senior Federal Auditor

United States Department of Defense
Defense Contract Audit Agency
Rocky Mountain Field Office
10375 Park Meadows Drive, Suite 560
Littleton, Colorado 80124

(303) 969-5000 ext. 254
Joshua.McGill@dcaa.mil
January 14, 2016

Mr. Joshua McGill
9 Perins Vista Drive
Durango, CO 81301

Re: OSC File No. MA-15-3738

Dear Mr. McGill:

By law, the Office of Special Counsel (OSC) has 240 days from the date we receive your complaint to make a determination whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is about to be taken. (The law setting forth this requirement can be found at 5 U.S.C. § 1214(b)(2)(A)). The law states that if OSC cannot make this determination within the 240-day time period, it must terminate its consideration of the complaint unless you and OSC agree to extend the time to complete the investigation and legal analysis.

December 31, 2015, was the 240th day after we received your complaint. At this time, therefore, you have three options:

1. You may extend OSC’s deadline for making a determination for an indefinite time and until the investigation and legal analysis are completed. If you select this option, of course, you may change your mind at any time and notify us in writing that you want OSC to discontinue work on your case, or,

2. You may discuss the case with me and we can establish a mutually acceptable deadline for completion of the investigation. If for some reason OSC does not complete work on your case before this new deadline, you may discuss the case again with me, and establish a new completion date, or,

3. You may decline to grant any extension of time. In this case, because OSC has not yet made a determination on the merits of your case, OSC will terminate the investigation and close the case.

I may continue investigating your complaint only if you agree to extend the deadline. Please contact me at (202) 254-3656 with your decision. You may also write me at the above address or send an email to: ageliga@osc.gov.

Sincerely,

Alissandra Geliga
Attorney
Complaints Examining Unit
February 23, 2016

Mr. Joshua McGill
9 Perins Vista Drive
Durango, CO 81301
(via email to Joshua.McGill@dcaa.mil)

Re: OSC File No. MA-15-3738

Dear Mr. McGill:

This is a 60 day status update, i.e., 60 days since the last status notice was sent to you concerning your complaint to this office. In accordance with 5 U.S.C. § 1214(a)(1)(C)(i) the Office of Special Counsel (OSC) is required to advise you of the status of your complaint within 90 days after our initial notice to you that we had received your complaint. We are also required to update that notice every 60 days thereafter. 5 U.S.C. § 1214(a)(1)(C)(ii).

OSC receives a large number of complaints and it is our general practice to review such matters in the order in which they are received. OSC received your allegations of reprisal for whistleblowing and reprisal for engaging in protected activity on May 5, 2015. The 120th day after receipt of your complaint was September 2, 2015. The complaint has been amended several times and includes the February 18, 2016, proposed five-day suspension. I may contact you in the near future to discuss your complaint with you in detail if I need any additional information.

Sincerely,

[Signature]
Alissandra Geliga
Attorney
Complaints Examining Unit
Mr. Joshua McGill  
9 Perins Vista Drive  
Durango, CO 81301  

Re: OSC File No. MA-15-3738  

Dear Mr. McGill:  

On January 14, 2016, we sent you a letter notifying you that December 31, 2015, was the 240th day since you filed your complaint with the Office of Special Counsel (OSC) against the Department of Defense, Defense Contract Audit Agency. As explained in the letter, pursuant to 5 U.S.C. § 1214(b)(2)(A), OSC could continue processing the complaint only if you agreed to an extension of time. The letter also explained “you may change your mind at any time and notify us in writing that you want OSC to discontinue work on your case.” Although you granted an initial extension, you have decided to no longer agree to the extension of time; therefore, we have closed your complaint.  

Because your complaint was analyzed for potential violations of 5 U.S.C. §§ 2302(b)(8) and/or (b)(9)(A)(i), (B), (C), or (D), you may have a right to seek corrective action from the Merit Systems Protection Board under the provisions of 5 U.S.C. §§ 1214(a)(3) and 1221. You may file a request for corrective action with the Board within 65 days after the date of this letter. The Merit Systems Protection Board regulations concerning rights to file a corrective action case with the Board can be found at 5 C.F.R. Part 1209. It is important that you keep the accompanying letter because the Merit Systems Protection Board may require that you submit a copy should you choose to seek corrective action there.  

Sincerely,  

Alissandra Geliga  
Attorney  
Complaints Examining Unit
Mr. Joshua McGill  
9 Perins Vista Drive  
Durango, CO 81301

Re: OSC File No. MA-15-3738

Dear Mr. McGill:

This letter notifies you that you may have a right to seek corrective action from the Merit Systems Protection Board (the Board). As we informed you in our closure letter, as of this date, we have ended our inquiry into your allegations.

In your complaint, you alleged several personnel actions, including a recently proposed 5-day suspension, as reprisal for whistleblowing and engaging in protected activity. Because you alleged potential violations of 5 U.S.C. §§ 2302(b)(8) or (b)(9)(A)(i), (B), (C), or (D), you may have a right to seek corrective action from the Board under the provisions of 5 U.S.C. §§ 1214(a)(3) and 1221. You may file a request for corrective action with the Board within 65 days after the date of this letter.

The Board regulations concerning the rights to file an individual right of action can be found at 5 C.F.R. part 1209. If you choose to file, submit this letter to the Board as part of your appeal. Additional information about filing an appeal with the Board is available at the Board’s webpage: www.mspb.gov.

Sincerely,

Alissandra Geliga  
Attorney  
Complaints Examining Unit
Sir:

I have reviewed the attached and have the following concerns.

The purpose of the 29 and 30 December conversations was to Disclose to you as my supervisor that I reasonably believed that the actions of then Regional Audit Manager Jerry McAfee in the referenced meeting on 2 April 2014 violated rule, law and/or regulation. Specifically, I alleged that Mr. McAfee had ordered substantiated findings of fraud, waste, abuse and corruption (e.g. gross mismanagement, gross waste of funds, violations of rule, law and regulation, and violation of the terms of grant agreements) to be removed from the draft audit report for the NEON Post-Award Accounting System Examination. In response, you stated that you would believe those allegations "when [you] heard them". I then disclosed the existence of a tape recording of the conversation as evidence to support the Disclosure, as well as a Disclosure in and of itself (since it contained further disclosable materials not mentioned in my summary to you during our conversation). Subsequently, I received the attached memorandum.

5 U.S.C. § 2302(b) states:

"Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority-

[...]

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of-
(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) any violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs..."

A "personnel action" includes "an action under chapter 75 of this title or other disciplinary or corrective action" (5 U.S.C. § 2302(a)(2)(A)(iii)). As the purpose of the memorandum is to direct me to correct my behavior or face disciplinary action, it is undoubtedly "corrective action" as defined by the Act.

The alleged violation of DCAA Instruction 1426.2 would not have occurred but for my alleged recording of the 2 April 2014 meeting for purposes of substantiating a disclosable issue. Further, the alleged violation would not have been known to you but for my 29 and 30 December Disclosures, wherein the recordings were offered as evidence upon your expressing doubt as to the truthfulness of the Disclosures.

Presuming, for the sake of argument, that I made the recording in question in violation of the DCAA Instruction, your actions constitute a prohibited personnel practice. You were informed of the existence of the recordings during the course of protected Disclosures, and the recording would not have existed, nor been known to you, but for those Disclosures. No law bars such a recording (Colorado is a single-party consent state), nor do you cite any. Instead, you cite a DCAA Instruction (mere "rule"). In Department Of Homeland Security v. MacLean, 574 U.S. ___ (2015) the Supreme Court held that personnel action cannot be taken against a whistleblower for making a Disclosure that violates a mere rule or regulation, but only a "law" (meaning a statute). In that case, Mr. MacLean disclosed information to the media in direct violation of DHS policy, for which he was terminated. The Supreme Court reversed his termination on the grounds that it violated the Act. Permitting an agency to interfere with whistleblower disclosures (and gathering evidence to support disclosures is surely interference) using mere rule and regulation would permit an agency to defeat Congress's express intent under the Act - a danger recognized by the Supreme Court in MacLean.

MacLean is substantively identical to the alleged facts here. I Disclosed information to you as my supervisor that may have violated DCAA policy insofar as it included evidence (the recording) that was prohibited by the DCAA Instruction. In response to the Disclosures, you issued the attached corrective action. Because the corrective action accuses me of violating a mere "rule" in the course of making the Disclosures, and said alleged violation would not have been known to you but for the Disclosures made directly to you on 29 and 30 December - the corrective action constitutes a prohibited personnel practice in violation of the Whistleblower Protection Act. If your actions here were lawful, there would be nothing to stop an agency from making a rule that no evidence of the existence or contents of a conversation (recording, written notes, etc.) could be made without authorization - which would undoubtedly infringe upon the Act. At bottom, DCAA's mere policy prohibiting unauthorized recordings must
yield to the Act when the recordings exist purely to support a whistleblower disclosure, and neither their creation, existence, or disclosure violate a law.

Moreover, the corrective action also has a chilling effect on my ability to make further Disclosures. For example, I have other disclosable violations I may wish to Disclose to you or others within DCAA. If, hypothetically, I had recordings of those violations to offer to you as evidence, I would not be willing to do so now because the corrective action specifically states that further violation of the DCAA Instruction could result in disciplinary action. It is unlawful to intimidate a witness or informant into not disclosing such a violation or cooperating in an investigation or proceeding (see, e.g. 18 U.S.C. § 1512). Nevertheless, if I had recordings as evidence in my possession, the attached could easily intimidate me into not providing that evidence to the appropriate authorities.

In addition, DOD policy and the Inspector General Act prohibits the disclosure of the identity of a whistleblower and/or the content of a Disclosure to an unauthorized party. You state in the attached that you discussed my Disclosure (or at least the recorded evidence) with Mr. Quant, Ms. Vaill, and Mr. Jones. None of these individuals is presently in my chain of command, nor is in any way authorized to be informed of my identity as a whistleblower, nor the existence of evidence supporting a Disclosure. Therefore, your actions in informing these individuals of evidence related to a protected whistleblower Disclosure (i.e. the recording) is improper. Further, it places me in danger physically, mentally, and professionally by disclosing the existence of evidence in ongoing investigations into the conduct of DCAA employees to some of the very employees being investigated. As you are aware, I already have cases proceeding before the Office of Workers Compensation Programs and DCAA’s EEO Office related to these matters - and your improper actions certainly causes me further unhealthy anxiety related to my (entirely justifiable fear, based on the attached) that DCAA will continue to take unlawful measures to intimidate me into not making Disclosures or, at the very least, holding back what would (if such hypothetical recordings existed) be the best evidence of wrongdoing that I could Disclose.

Next, last year I invoked my Weingarten representation rights for any meetings with DCAA management related to my protected Disclosures wherein disciplinary action was possible. I reasonably believed that the purpose of the 29 and 30 December meetings was to discuss my Disclosures. However, you specifically asked me about the recording in the 30 December meeting. It is apparent from the attached that your purpose in asking that question on 30 December was to obtain evidence to use in accusing me of violating DCAA policy, and taking the attached corrective action. While it is debatable whether 29 December meeting was covered under Weingarten, because your intention in the 30 December meeting was to obtain evidence to support disciplinary action, that meeting should have taken place with my Union representative present. Because it did not, my Weingarten rights were violated - and you may not use the evidence obtained in that meeting to support administrative action, even if such action were not otherwise barred by rule or law. In other words, you deliberately tricked me into providing you with evidence to use in the attached action under the guise of asking for information related to the protected Disclosures, and you may not therefore lawfully use such information for disciplinary purposes.

Finally, as I have previously communicated to you and others my superior, my mental and physical heath has been gravely damaged by being forced to report to individuals who have repeatedly violated my legal rights, and intentionally inflicted emotional distress upon me. I have repeatedly requested (and been repeatedly denied) being temporarily moved to a different chain of command pending the outcome of the investigations into the conduct of my entire chain of command from you to the Director of DCAA. DCAA has in its possession a medical opinion from my primary care physician stating such circumstances create a hostile and unhealthy working environment. As
you know, I am in the process of obtaining a second opinion from a state-certified psychiatrist confirming my primary care physician's findings to support my Rehabilitation Act (as requested by the DCAA EEO Office) and OWCP claims. This latest unlawful action makes it clear that I am not safe from unlawful actions by my employer even while working on full-time telework from my home office. Again, I am informing you that my present working environment poses a clear and present danger to my physical and mental health, and that fault for those conditions lies with my employer.

Therefore, I request the following:

1) The immediate withdrawal of the unlawful corrective action and confirmation that the use of any recordings, should they exist, for the purpose of supporting otherwise lawful Disclosure under the Whistleblower Protection Act is lawful, and that DCAA will take no action against me should I hypothetically provide the hypothetical recordings to the appropriate authorities.

2) My immediate placement on paid administrative leave, for my own health and safety, until such time as a) the OSC investigation into DCAA's alleged prohibited personnel practices concludes, b) a final Rehabilitation Act decision is made by DCAA's EEO office, c) a final determination (including appeals) is made on my OWCP claims, and d) any action in response to the outcomes of a-c is completed.

Your swift response to these requests is appreciated.

Regards,

J. Kirk McGill

Joshua Kirk McGill

CPA, CFE, CIA, CMA, CISA, Cr.FA, CGAP, CGMA; M.S. Acct.

Senior Federal Auditor

United States Department of Defense
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Kirk,

Please see attached regarding your violation of DCAA Instruction 1426.2, Prohibition of Nonconsensual Use of Recording Devices in the Work Environment, dated December 5, 2013. The intent of this counseling memorandum is to bring to your attention the prohibition on nonconsensual recordings in the work environment so that you may adhere to this policy in the future.

I am available to discuss this memorandum if you have any questions or concerns.

Colin A. Eve

Defense Contract Audit Agency

Phone: (303) 969-5000 ext. 277

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Mr. J. Kirk McGill

From: McGill, Joshua, Mr, DCAA <Joshua.McGill@dcaa.mil>
Sent: Tuesday, February 2, 2016 3:01 AM
To: Eve, Colin, Mr, DCAA
Cc: Rogers, Brett, Mr, DCAA; Hampton, Kevin, Mr, DCAA; Graff, Diana, Ms, SES DCAA; Janysek, Angela, Inspector General DCAA; Hoffman, David, Mr, DCAA; Bales, Anita, Ms, SES DCAA; Edwards, Anthony, Mr, DCAA
Subject: Whistleblower Disclosure of Unlawful Interference in the OWCP Claims Adjudication Process

Sir:

A few weeks ago you informed me that you were filing an ethics complaint with the Office of Congressional Ethics against my Congressman Scott Tipton related to my OWCP claims. Your stated reason for the ethics complaint was that you felt, based on (inaccurate) interpretations of conversations between you and I, that Mr. Tipton had improperly interfered in the OWCP claims process.

Having had some time to consider the matter and your conduct over the past seven months, as well as the opportunity to read Mr. Tipton's letters to OWCP on my behalf (provided to me by OWCP) and talk it over with counsel and my the independent psychologist preparing the mental health evaluation requested by DCAA on 19 January, I conclude that while your filing of the complaint is a personal decision, you telling me about it this context was designed to interfere in my OWCP claims and was, therefore, improper. Simply put, a reasonable person could conclude that your informing me you were filing a complaint against my Congressman related to his efforts on my behalf in the OWCP process was designed to have a chilling effect upon my involvement in the OWCP claims process by causing me (who you know very well is devoted to ethics and the law) to stop requesting assistance from Mr. Tipton's office, to my detriment.

While your actions might be easily explained away in a vacuum, this is far from a vacuum. You and other DCAA officials have engaged in a pattern of alleged misconduct, including numerous instance of interference in the OWCP and EEO processes, for some time. For example, you refused on 3 August 2015 to issue OWCP Form CA-16 as required by law for my traumatic injury (Achilles' tendon rupture), thereby interfering with my ability to be treated by a physician of my choice in direct violation of the Federal Employees' Compensation Act and its governing regulations. You have also made repeated false and/or misleading responses in your filings to OWCP, including statements referred to in my email from earlier today regarding my disability in which you placed blame for my disabilities upon my disabled spouse -- a dastardly, insulting, and indeed illegal act. You have questioned the medical basis for my claims, which by law you may not (given you are not a "physician") do. Together, these false and/or misleading statements have caused OWCP to improperly deny my claim based explicitly on your statements which include, for example, several incomplete quotations of my physician deliberately designed to mislead (and that did in fact mislead) the claims examiner -- forcing me into costly appeals. You have illegally provided information regarding my claims to other DCAA employees not authorized to receive such information. The Agency's actions have a clear motivation and explanation: to attempt to undermine my allegations against it by damaging my mental and physical health and casting aspersions upon my professional competence and reputation. The Agency's continued refusal to remove me from the chain of command I am accusing of misconduct until that chain of command is cleared (or convicted) of the alleged misconduct is proof positive of its bad faith in this matter because it leaves me at the literal and figurative mercy of officials who have every reason to want me reduced to a physical and mental wreck and thoroughly discredited professionally. Indeed -- all of the Agency's action of late can be explained by its trying to push me over the proverbial edge until I either have a complete mental or physical breakdown, do something stupid (e.g. make threats against my employer) to 'legitimately' justify its taking employment action against me, or quit (which would likely end the investigations into its conduct).
Indeed, your actions and those by your superiors have left me, over the past seven months, in a near constant state of anxiety due to your constant threats to revoke the interim accommodations for my disabilities, a threat you finally followed through on last Friday -- as well as the ongoing hostile work environment. Rather than spending the last seven months healing, as envisioned by my physicians, my physical and mental conditions have actually deteriorated as I have been forced to continually fight back against the Agency's spurious allegations and attacks upon my character. I am objectively in worse condition mentally and physically now that I was on 1 July -- and DCAA's interference in my OWCP claims (lead by yourself) is the root cause of this situation.

I therefore conclude that there is probable cause to believe that your actions, in the aggregate, have violated the non-interference provision of the FECA, in addition to other rule and law previously referenced (e.g. the anti-retaliation provisions of the Rehabilitation Act, prohibition against intimidating against a witness or informant, false statements, etc.) -- and I refer the matter to the DCAA Office of the Inspector General and others your superior for an appropriate investigation and, if appropriate, action. As DCAA Central Region Director Diana Graff countersigned your false and/or misleading statements to OWCP, attached to my previous email, I extend this same allegation to her.

Please note that the above is a Disclosure of alleged violations of rule, law or regulation within the protections of 5 U.S.C. § 2302 and are made pursuant to the requirements of 5 CFR § 2635.101(b)(11) regarding fraud, waste, abuse and corruption.

Regards,

J. Kirk McGill

Joshua Kirk McGill
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Mr. J. Kirk McGill

From: McGill, Joshua, Mr, DCAA <Joshua.McGill@dcaa.mil>
Sent: Tuesday, February 2, 2016 1:42 AM
To: Eve, Colin, Mr, DCAA
Cc: Rogers, Brett, Mr, DCAA; Hampton, Kevin, Mr, DCAA; Graff, Diana, Ms, SES DCAA; Janysek, Angela, Inspector General DCAA; Hoffman, David, Mr, DCAA; Bales, Anita, Ms, SES DCAA; Edwards, Anthony, Mr, DCAA
Subject: Termination of Interim Accommodations & EEO Complaint

Sir:

I have reviewed your order below terminating my interim reasonable accommodation of being assigned to full-time telework, and instructing me to report to you at the DCAA Rocky Mountain Branch Office the week of 8 February 2016 (presumably on 9 February since Mondays are my regular day off). I will comply with the order, which I assert violates rule, law and/or regulation, under protest.

I conclude that the order is unlawful for the following reasons:

1) Your stated reason for the revocation of the interim accommodations below is materially inaccurate for two reasons.

First, I was placed on telework on 1 July 2015 when I first reported my disabilities (also claimed as occupational diseases under the Federal Employees' Compensation Act) to you, and have continued in full-time telework from 1 July through today. Below you state that I was only given interim accommodation for the Achilles' tendon injury that occurred on 2 August 2015. This statement is temporally impossible. I cannot have been accommodated on 1 July for an injury that hadn't happened yet.

Second, Mr. Edwards stated in his memo of 19 January 2016 (attached hereto as "2016-01-19 Additional Docs Request (McGill)-signed"): "Until the requested medical documentation is received, continuation of current interim accommodation is recommended".

That statement is *precisely* the opposite of your citation of Mr. Edwards below: "Mr. Edwards explained to me that the intent of this language was not for you to remain on full-time telework while waiting for you to gather additional medical documentation, but that the interim accommodation for your Achilles tendon injury should remain."

Since no medical documentation was requested related to the Achilles' injury in the 19 January memo (indeed, the Achilles' injury is not mentioned, which makes sense since the memo has nothing to do with that injury), your citation of Mr. Edwards' is not consistent with Mr. Edwards' written statement and contributes to my allegations that DCAA is deliberately subjecting me to a hostile and unhealthy work environment to force my resignation (i.e. constructive termination) and/or intimidate me into not pursuing my whistleblower and EEO allegations -- and is deliberately violating rule, law and regulation (including its own policies) to do so. Speaking of which...
2) DCAA has violated its own reasonable accommodation policies in this matter.

(a) The Agency received my request for reasonable accommodation orally on 1 July 2015, (according to Mr. Edwards on 2 July 2015, but that is neither here nor there). It confirmed receipt and requested medical documentation on 17 July 2015 (note: this violates the Collective Bargaining Agreement that requires action within five business days, unless additional time is requested in writing prior to that point -- which it wasn't). I provided the requested medical documentation the same day, with a follow-up on 31 July when Dr. Sharp's formal report was ready. The Agency has not yet provided a decision -- nearly seven months later. Indeed, according to Mr. Edwards 19 January memo, the Agency did not even request an second opinion from Federal Occupational Health (FOH) until 28 September 2015 -- nearly three months after accommodation was requested.

The Agency is required by DCAA Personnel Manual, Chapter 69, Section 3.8 to provide a decision on reasonable accommodation within 20 days of the request, unless extenuating circumstances exist. Presuming, arguendo, that the Agency's decision to send a request to FOH for a second opinion qualifies as an extenuating circumstance (likely), and that its delay in requesting the FOH opinion until 28 September was reasonable (far less likely), the Agency nevertheless violated Section 3.8(c) which states:

"Where extenuating circumstances are present, the Deciding Official must notify the individual of the reason for the delay, and the approximate date on which a decision, or provision of the reasonable accommodation, is expected."

At no point did I receive any notification that my request was officially delayed. Indeed, the first I officially heard about DCAA sending the case to FOH for a second opinion was when I received an email from Mr. Edwards on 10 November 2015 -- more than four months after the filing and over a month after the case was sent to FOH. The email did not state that the request was delayed (although that was somewhat obvious), nor give an estimated decision date.

(b) DCAA Personnel Manual, Chapter 69, Section 3.8(e) states:

"If a delay is attributable to the need to obtain or evaluate medical documentation and the Agency has not yet determined that the individual is entitled to an accommodation, an accommodation may be provided on a temporary basis. In such a case, the Deciding Official will notify the individual, in writing, that the accommodation is being provided on a temporary basis pending a decision on the accommodation request."

The Agency has violated this policy in two ways.

First, I have not been notified that I was being provided with a temporary accommodation because of the Agency's need to evaluate the medical evidence I provided for my anxiety, or for my Achilles' injury (the former presumably by obtaining the FOH opinion) -- even though Mr. Edwards' email of 10 November 2015 and memo of 19 January 2016 strongly supports the conclusion that the delay was caused by precisely that -- and even though I have been on temporary accommodation (full-time telework) since 1 July 2015. It makes no sense that the you are asserting that interim accommodations were needed because of the Achilles' injury, when the FOH analysis had nothing to do with that injury. Accommodation for the Achilles' injury should, therefore, have been finalized months ago. This supports my assertion that my substantial recovery from the Achilles' injury is merely a pretext for revoking interim accommodation that were, in reality, for my anxiety disability.

Second, on that subject, the Agency is terminating the interim accommodations *before* a decision on the accommodation request has been made, contrary to the policy cited above. Indeed, the 30 day period initially provided for me to respond to the 19 January 2016 request for medical documentation (which I requested in writing on 20 January be extended until at least 15 March 2016, as documented in the attached "2016-01-20 Rehab Act Response") will not expire until 18 February 2016 -- over a week after your order terminating the accommodations goes into effect. DCAA was arguably not obligated to give me interim accommodations, but once implemented its
policies make clear that such accommodations remain in place until a decision is rendered -- which has not yet occurred, through no fault of my own.

(c) DCAA Personnel Manual, Chapter 69, Section 3.7(e) states:

"If the medical documentation must go to an Agency physician for evaluation, the decision shall be made and the accommodation, if granted, will be provided within 20 business days from the date the Agency physician provides relevant information to the Deciding Official or Reasonable Accommodation Advisor."

DCAA received the letter from FOH's physician on 10 December 2015. DCAA did not make a decision as of today and, as noted above, cannot make the decision until at least 18 February -- both well past the 20 day deadline -- leading us to:

(d) The Agency did not request the additional medical documentation until 19 January 2016 -- 26 business days (i.e. excluding weekends and Federal holidays) after receipt. Therefore, presuming that receipt of the FOH physician's report on 10 December restarted the 20 day clock, the Agency nevertheless violated Section 3.7(d) which states:

"If the Deciding Official believes that it is necessary to obtain medical information to determine whether the requesting individual has a disability and/or to identify the individual's functional limitations, the Deciding Official will request the medical documentation as soon as possible after his or her receipt of the request for accommodation, but before the expiration of the 20-day period."

Because it did not request additional medical documentation until 19 January -- outside of the 20 day period (even if measured from 10 December) -- the Agency violated the policy.

3) Mr. Edwards stated to me in a telephone conversation on 1 February that the it was appropriate to terminate the interim accommodations because DCAA possessed no medical evidence establishing that returning me to the office would pose a threat to my health. This statement contradicts both your statement below that the continuation of interim accommodations referred only to my Achilles' injury -- and Mr. Edwards own written statement of 19 January -- as noted above. 'There are now two mutually exclusive explanations for why the interim accommodations are being terminated -- yours (allegedly from Mr. Edwards' verbal statements to you), and Mr. Edwards' verbal statements to me -- neither of which are consistent with Mr. Edwards' written statement of 19 January. Of even greater concern, when I asked Mr. Edwards during our telephone conversation of 1 February which explanation was correct, he stated to me that he 'did not care which explanation was correct' -- because 'either way the accommodations will be terminated'. It certainly appears from that statement that the Agency is making things up to justify the revocation decision -- and couldn't even be bothered to get its fabricated justifications in order.

Moreover, DCAA has in its possession a statement by my primary care physician Dr. Patrick Sharp dated 31 July 2015 stating that I should not be returned to the office environment until at least August 2016, and the investigations into DCAA's (including your) conduct have concluded (whoever comes later) -- as doing otherwise would cause further damage to my physical and mental health by exposing me to a hostile and unhealthy working environment and the deprivations of DCAA's officials whom I have accused of misconduct -- and would not give me adequate time to recover from my injuries (note: that due to DCAA's continuous harassment over the past seven months I have not made virtually in progress in my recovery and it is likely that my recovery will not even begin until DCAA's retaliation and harassment are stopped.

Mr. Edwards stated that DCAA does not accept Dr. Sharp's medical qualifications to make the diagnoses, which Mr. Edwards stated was supported by the FOH physician's report. You and Regional Director Diana Graff made similar statements in your written response to my OWCP claims (which I have attached hereto as "DCAA OWCP Response"). However, as previously stated to you and others my superior, you, Ms. Graff (and Mr. Edwards) are not medically qualified *by law* to simply dismiss Dr. Sharp's written diagnoses. Instead, you are obligated to get a second opinion from a qualified physician -- which in this case the Agency requested and received from FOH.
However, the FOH physician's report does not contradict Dr. Sharp's medical diagnoses. Indeed, the FOH physician substantially agrees with Dr. Sharp and states:

"It is reasonable to assume that Mr. McGill would be suffering from situational anxiety secondary to his duties with DCAA" and "It appears reasonable that Mr. McGill would have difficulty working in the office about which he has raised charges of impropriety".

Instead, the FOH physician asks some technical questions about Dr. Sharp and his qualification (which I answered in the 20 January "Rehab Act Response") and recommended that DCAA request "An evaluation from a mental health professional including Mr. McGill's related work limitations" -- something Dr. Sharp himself recommended in his 31 July statement to verify his anxiety diagnosis.

Regardless, the FOH physician makes it clear that his concern is not whether or not I have anxiety (flatly contradicting the Agency's statement to OWCP that I have no anxiety, or that it is entirely from non-work sources by the way), but whether or not that anxiety medically fits within the legal definition of a "disability" under the Rehabilitation Act (which is why he recommends the mental health evaluation) and "Clarification of Dr. Sharp's role in [my] care" -- the latter of which again I provided on 20 January).

Therefore, DCAA has no medical evidence whatsoever contradicting Dr. Sharp's determination that being returned to the office environment poses a substantial and ongoing danger to my physical and mental health. Quite the opposite, the Agency has a report from FOH essentially confirming the existence and work-related source of the anxiety Dr. Sharp diagnosed, but recommending further medical information be gathered to determine whether that work-caused anxiety fits within the legal definition of a "disability" and, thus, whether it is eligible for accommodation. The Agency's mere unqualified belief that Dr. Sharp's conclusions are wrong is not even close to sufficient evidence to disregard his medical opinion, especially as the FOH opinion substantively confirms them.

As such, Mr. Edwards' verbal statement of 1 February is demonstrably incorrect -- and the decision to terminate the interim accommodations is premature at best. Indeed, I would argue that after 7 months of policy violations and delays by DCAA -- the Agency's decision to terminate the interim accommodations a mere two weeks after requesting a formal mental health evaluation (which, as I explain in the attached "Rehab Act Response" is a lengthy process) is significant evidence that the Agency is not acting in good faith in this matter. Combined with the Agency's allegedly retaliatory course of conduct in regards to me previously, and Mr. Edwards' inexplicable deviation from his own written statement, your order below is unquestionably arbitrary, capricious, and contrary to rule or law and places me in substantial physical and mental peril.

Therefore, pursuant to 5 U.S.C. § 2302 I Disclose to you and the others copied herein that your order below constitutes a violation or rule, law or regulation, and is "abuse" and "corruption" within the meaning of 5 CFR § 2635.101(b)(11). I therefore request that the order be withdrawn immediately and I be provided a reasonable period of time (45-60 days) to undergo the requested mental health evaluation, receive the psychologist’s written report, and provide the results from the same to the Agency as requested on 19 January, while remaining on my existing interim accommodations in the meantime. If the order is not withdrawn, I will report to you at the Rocky Mountain Branch Office on Tuesday 9 February 2016 at 6:00 AM Mountain Time (unless instructed to report at a different date and/or time).

-------------------------------------------------------------

Next, I hereby inform you that due to the Agency's improper actions, including its actions in processing of my request for reasonable accommodation culminating in your order below, I desire to file an EEO complaint. The initial basis for this complaint is that DCAA has engaged in disparate treatment and retaliation against me on the basis of my claimed physical and mental disabilities -- as evidenced by the inordinate length of time (some seven months) without a decision on my request for reasonable accommodation, multiple violations of DCAA's own
policies and administrative procedures governing the processing of reasonable accommodation requests (as discussed above) during that period, and retaliation in the form of the revocation of my interim accommodation (i.e. telework) without valid non-discriminatory justification, as well as other retaliation and discriminatory motivations as described below.

I believe the above (and below) and the rest of the evidentiary record on this matter amply establishes a prima facie case for unlawful disability discrimination insofar as terminating my interim accommodations is an adverse action, there is no legitimate nondiscriminatory reason for such action (given both reasons presented by you and Mr. Edwards are simply and demonstrably incorrect and/or unlawful) and that the differing explanations by you and Mr. Edwards attempting to justify the adverse action (both of which contradict Mr. Edwards' written statement of 19 January recommending the accommodations continue) are merely a pretext for such unlawful discrimination.

The latter point is especially important given the repeated attacks by you and Ms. Graff (especially in its response to my OWCP filing) and Mr. Edwards upon the qualifications of my primary care physician Dr. Sharp, a subject on which none of you (as non-physicians) are qualified to speak. If Dr. Sharp's medical evidence was so deficient (as you and Ms. Graff alleged in the OWCP response), then why bother sending the matter to FOH for a second medical opinion in the first place, rather than simply denying the request on its merits? It is telling that it was only after the Agency's repeated statements that my work environment has not, does not, and will not cause me substantial anxiety were contradicted by the opinion of the Agency's *own* physician, that it undertook this adverse action and revoked my interim accommodations. In other words, when the Agency's own physician at FOH didn't give the Agency the answer it was looking for (and, indeed, contradicted the Agency's assertions that my work environment didn't cause me any anxiety), it manufactured a pretext and revoked my accommodations without even bothering to give me the opportunity to provide the medical information that the Agency's physician explicitly recommended it request (and, apparently, without looking at a calendar since the Achilles' injury hadn't even happened at the time I requested and received interim accommodation).

Indeed, the fact that the order below goes into effect over a week before the Agency's deadline for providing additional medical documentation provides direct evidence of a discriminatory motive in the form of prejudging the existence (or lack thereof in this case) of my claimed disabilities. To put it another way, the Agency does not believe that I have a legitimate disability, and is therefore taking action to interfere with, undermine, and otherwise chill my participation in the EEO process regardless of whether those actions comply with the Rehabilitation Act, DCAA's own EEO policies, or simple logic (e.g. your assertion below, oft repeated previously, that I was being accommodated for an injury a month before it occurred).

DCAA officials have from day one expressed to me that they do not believe that I am disabled and/or that my employment did not cause whatever disabilities might exist. At one point it blamed a car accident from 2007 which resulted in some weight gain (from which I was fully recovered by the end of 2012, as evidenced by my weighing a healthy 185 pounds in December 2012 according to Dr. Sharp's 31 July statement) for my anxiety and weight gain -- despite having never requested nor received any medical documentation of any kind on the accident and my recovery from the same. Further, in a number of statements, the Agency directly blames *me* for any disability that might exist -- essentially arguing that my disabilities are self-inflicted. Some of these statements are documented in DCAA's own words, including in DCAA's statement to OWCP attached above. My 'favorite' statement is this gem:

"We would also like to point out that Mr. McGill has yet to demonstrate the ability to work in a cohesive, cooperative office setting because he tends to create a win/lose scenario in each work situation he encounters. This inability to work cooperatively with his coworkers and managers is likely an additional source of stress for Mr. McGill."

Given that I have always had a fully successful (or higher) performance evaluation rating (contradicting the Agency's 'Kirk is a bad employee' narrative) and was not cooperating with my fellow employees and managers *deliberately* because I believed (accurately as it turned out) that they were covering up fraud and mismanagement at NEON --
this statement is both humorous, and proof positive that the Agency has its own agenda in this matter -- and that agenda is to undermine my allegations by attacking me and, in this case, my disabilities. I refer you again to the September 2014 incident in which I was accused of being insane and of threatening to blow up the United States Capitol by DCAA's Security Office (both later proven to be fabrications) only days after the Washington Post and Wikipedia broke the news of my whistleblowing. I also remind you that during that same period, a DCAA employee, using a DCAA computer on official time made comments about my sanity in internet posting, as confirmed by DCAA's own internal investigation. Clearly inappropriately questioning my professional capabilities and fitness for duty and implying I am crazy (but apparently not crazy enough for it to be a disability) is par for the course from DCAA thus far.

Finally, I note that in the written response to OWCP, DCAA attempts to blame (at least in part) my wife's disability (she has a chronic illness recognized under the Americans with Disabilities Act) for my own disabilities. Indeed, DCAA states: "Mr. McGill's claim narrative and medical documentation lacks information regarding his wife's medical condition (a neuromuscular disorder) which likely has an impact on Mr. McGill's alleged claims. He has repeatedly explained that his wife's medical condition often requires active care from him during the night and prevents him from getting sufficient sleep".

This statement is both inaccurate (for example, my wife has been disabled since 2008, her condition has not gotten any worse, but I only developed anxiety starting in 2013 more than a year after I started at DCAA and five years after she was diagnosed) and also establishes yet another direct discriminatory motive insofar as discrimination based on association with a disabled family member is itself unlawful discrimination (also note that discrimination based on the need to care for a disabled family member is unlawful under the Family Medical Leave Act, which I explicitly invoked as to my wife's illness with DCAA years ago). DCAA repeatedly discusses in the OWCP response how much of a burden my wife's disability has been upon the Agency, and blames her for causing my anxiety -- and absurd, insulting, and indeed illegal allegation.

Indeed, almost all DCAA's arguments from its OWCP filings are absent from its reasonable accommodation correspondence -- perhaps because DCAA is aware that such statements (e.g. blaming an employee's disabled spouse for the employee's anxiety disability, accusing the employee of lying about a disability, questioning the employee's doctor's qualification without being qualified to do so, accusing the employee of causing his own disabilities etc.) violate the Rehabilitation Act because they are evidence of discriminatory animus. At bottom, these statements provide significant evidence that DCAA has engaged in a pattern of unlawful discrimination towards me, and are merely attempting to manufacture an 'EEO compliant' justification to support its prejudgment that my disabilities do not exist, or, at least, are not its fault -- and thereby to punish me (by revoking my interim accommodation, something it has threatened before) and chill my participation in the EEO process through neglect (7 months...) followed by retaliation and intimidation when its own physician issued a report substantively supporting my case, albeit with a few final pieces for me to fill in with the requested mental health evaluation.

Next, on 29 and 30 December 2015 I discussed with you by phone a meeting that occurred on 2 April 2014. I stated to you that I was ordered to commit an illegal act during that meeting by a senior DCAA management official, and that order contributed to my anxiety disability and colored my interpretation of every action by you and others my superior thereafter -- especially when my supervisors (who were also in the room) agreed to follow the order, even though they told me directly later they believed the order was wrong. When you then stated that you would believe my claim about what occurred during the meeting only upon the submission to you of proof, I informed you that I possessed (although I did not and do not admit to creating) a tape recording of the incident, which I offered to let you listen to (you did not take me up on the offer) to prove that an illegal act occurred during the meeting; an illegal act which substantially contributed to my disability at issue here. On 26 January I received corrective action (see "Counseling Memorandum" x2 attached hereto) accusing me of violating DCAA's blanket anti-recording policy. In the memo you state that you spoke to three individuals (Supervisory Auditor Michael Quant, Field Audit Office Manager Allen Jones, and Assistant for Quality Angie Vaill) about my recording the conversation. In doing so, you blatantly violated my rights under the Rehabilitation Act and the Federal Employees' Compensation Act by disclosing my identity as a claimant, as well as evidence supporting my OWCP and reasonable
accommodation claims, to parties that did not have the legal right nor need to know that information (note: your disclosure also violates the Collective Bargaining Agreement, and the Privacy Act, 5 U.S.C. § 552b). This fishing expedition to try and find that I violated the anti-recording policy (a policy that is, itself, unlawful -- as documented in the two attached emails on the subject -- both under the National Labor Relations Act, and as interference with an employee gathering evidence of unlawful discrimination under the Rehabilitation Act) is not only an unlawful act itself, but further proof that DCAA continues to engage in a systematic campaign of retaliation which it tries to mask in supposedly legitimate personnel actions like the revocation of interim accommodations at issue here. Therefore, insofar as disclosing my identity and evidence regarding my disability to unauthorized third parties, and having in place a blanket recording ban violates the Rehabilitation Act, I include those issues within my EEO complaint.

Moreover, it is an interesting fact that every single individual involved in the EEO decision process (other than Mr. Edwards) were implicated in criminal, civil, and/or administrative misconduct in my whistleblower disclosures months or years (in several cases) before I filed the OWCP claim and request for reasonable accommodation. These individuals, which include yourself, are well aware that they are under investigation by the various authorities, including the Office of Special Counsel -- because I directly told you all that information months ago (note: OSC does not confirm the existence of its investigations to employers, but if I lied about the existence of such an investigation I would be committing a felony). Persons implicated in criminal, civil, and administrative misconduct simply cannot ethically (or legally in the case of Federal employees) make decisions related to that same conduct because they have a personal stake in the outcome (see, e.g.5 CFR § 2635.101(b)(14) "Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards...").

In this case, my whistleblower allegations were that DCAA covered up wrongdoing at a Government grantee "NEON, Inc. (wrongdoing later confirmed to have occurred by the grantor and Congress, leading to the firing of the grantee in December 2015), and then retaliated against me for disclosing that information to Congress, the Inspectors General, and the Office of Special Counsel against orders. I then alleged that this retaliation, plus the large amount of time (hundreds upon hundreds of hours according to DCAA's OWCP response -- which I somehow as a junior employee 'self-initiated') I spent testifying and otherwise acting against my employer's interests (while having to report directly to the people I was accusing -- meaning all of you) caused the claimed disabilities here. This gives those individuals (many of whom are copied on this email), significant motivation to retaliate against me under the EEO process -- as, indeed, I have accused them of doing under other laws (e.g. the Whistleblower Protection Act). I have repeatedly requested that those individuals (including yourself) not participate in administrative actions involving me since their (and your) participation has the appearance of impropriety and violates the Code of Ethics for Executive Branch Employees -- to no avail. As such, there is abundant evidence in the record to support the assertion that you and others my superior are acting from animus in this matter. In other words, you have every reason to retaliate in order to undermine my efforts to have you investigated and convicted of misconduct. You have an administrative, financial, and personal interest in the outcome of my claims because if I am proven right any (or all) of you could be fired, fined, or even imprisoned. The more damage you can do to my health (and, perhaps more importantly, my credibility), the more likely it is that you will avoid the possible consequences of your alleged misconduct.

---Therefore, at *best*, there is an obvious and substantial appearance of impropriety in the Agency taking action related to disabilities that I allege it caused through its own misconduct!---

Given the above, please advise me on what action I need to take to pursue the EEO complaint.

--------------------------------------------

Lastly, I want to repeat that your instruction constitutes a direct order to subject myself to an environment that I (and you) have been advised is hostile and unhealthy by medical professionals, and that such an order violates rule, law and regulation. Mr. Edwards' statement during our 1 February conversation that I can either obey the unlawful
order or be terminated for "going AWOL", is unconscionable -- yet I have no choice but to obey, or apparently to lose my job. I feel pretty confident that giving me a choice between my health and my job is not lawful when reasonable accommodations (like those I have been under the past seven months) exist -- but I have little left in me with which to resist.

It is nevertheless worthy of note, that if I am wrong in my allegations (both previously, and above), then I will have to take responsibility for my actions (and I will gladly do so -- knowing I did the best that I could to comply with my oath and my obligations as a Federal employee) -- but the same is true for all of you if I am in fact correct in my allegations. I want to repeat that the DCAA officials copied on this email have a responsibility to prevent such a situation from occurring, and should they fail to do so they may very well be legally culpable, personally and professionally, for failing to intervene to protect me should it ultimately be determined that your order knowingly subjected me to further anxiety (exacerbating my disability), retaliation and the resulting physical and mental trauma thereof. If the Agency's actions are, as I assert, unlawful -- then I will use every lawful resource at my disposal to see the responsible officials are held accountable for their actions. I have suffered enough for doing the right thing. Vos omnes MINORIS me iterum ad periculum tuum pertinent

Vos estis monuit,

J. Kirk McGill

-------------------------------------------------------------------------------------------------------------------

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Kirk,

Yesterday I spoke with Mr. Edwards, the Reasonable Accommodation advisor in our Regional EEO office, regarding his recommendation in his January 19th memorandum to you regarding your request for reasonable accommodation.

In that memorandum, Mr. Edwards recommended "continuation of current interim accommodations". Mr. Edwards explained to me that the intent of this language was not for you to remain on full-time telework while waiting for you to gather additional medical documentation, but that the interim accommodation for your Achilles tendon injury should remain. Mr. Edwards explained that there is not sufficient documentation to support your request for reasonable accommodations and since you have stated to me that your doctors no longer believe telework is needed for you to recover from your surgery, I am expecting you to report back to the office.

Therefore, starting the week of February 8th, you should report to the office. You will be allowed situational telework to the same extent as your peers, which is limited to no more than 2 days per week, if there is portable work.

Colin A. Eve  
Defense Contract Audit Agency  
Phone: (303) 969-5000 ext. 277

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Ms. Johnson:

Attached hereto is the audio recording we discussed. The first twenty second or so of the conversation were not recorded because the recorder was not turned on until Mr. Edwards began making statements that appeared support my EEO claims. I deliberately cut the second half of the conversation to make it short enough to email as we discussed -- and because nothing of immediate interest was in the second half of the conversation. As we discussed, I can provide the raw unedited recording to you at a later time if needed since it is too large and long to email in its raw form.

The tape begins with me discussing the fact that Mr. Eve's explanation for revoking my interim accommodations (that they only applied to the 2 August 2015 leg injury, not the 1 July 2015 disabilities) contradicts Mr. Edwards' written statements on 19 January 2016. I will summarize the highlights of the tape below with time stamps and then summarize my thoughts at the end:

0:00 - 0:15 --- (partially cut off) I point out that the reason given by Mr. Eve for terminating my interim reasonable accommodation (because the interim accommodation was only for the Achilles' tendon rupture/leg injury) doesn't make sense because I was given interim accommodation (full-time telework) beginning on 1 July 2015, but the leg injury did not occur until 2 August. How can I have been given accommodation for something that hadn't happened yet?

0:25 - 0:33 --- Mr. Edwards states "regardless of what it [Mr. Eve's explanation] says, he's just asking you to come back to work" and that "it's your decision on whether or not you do".

0:35 - 0:45 --- I state that ordering me to return to work against doctor's orders is "a constructive termination waiting to happen".

0:53 - 0:56 --- Mr. Edwards states "You have not provided anything that says that you cannot come to work"

0:57 - 1:01 --- I respond by stating "I am looking at my doctor's statement [Dr. Sharp's 31 July statement] saying exactly those words".

1:02 - 1:04 --- Mr. Edwards states "I do not have that."

1:07 - 1:15 --- I explain that I am taking about Dr. Sharp's statement dated 31 July provided to Mr. Edwards when I filed the OWCP Form CA-2.

1:16 - 1:27 --- Mr. Edwards states "You are taking about the documentation you provided on August 2nd, it is the Agency's determination that that does not qualify ... that nothing in there is positive proof that you don't have the ability to come to work"

NOTE: This statement is, as I noted in my email to Mr. Eve earlier this morning, patently false -- as I believe you will agree after reviewing the statement yourself (which I sent you earlier today), and the FOH opinion.
1:28 - 1:39 --- I point out that Mr. Edwards' statement above has not been provided to me in writing.

1:40 - 1:42 --- Mr. Edwards states "Colin is telling you to come back to work".

1:43 - 1:52 --- I respond "Colin is giving me a reason for that [the termination of the interim accommodations] that is inconsistent with the reason you are giving me. You're saying it's a 'you didn't provide adequate documentation'

2:00 - 2:16 --- Mr. Edwards states "We're all expected to come into the office unless otherwise told that we can stay home" and badgers me into admitting that statement is, generally, true.

2:17 - 2:30 --- I state however that "If we're going to terminate the interim accommodation, then an explanation is required to be made". I further note that "An explanation has been made [by Mr. Eve, that the interim accommodations were only for the Achilles' injury] but that explanation is not the explanation you're giving me [that the termination was due to lack of adequate medical documentation related to the anxiety disability because the Agency does not accept Dr. Sharp's medical opinion as valid] and that's why I'm having an issue".

2:31 - 2:44 --- Mr. Edwards interrupts and states "Who cares? ... who cares if its because of your leg or because we don't have the medical documentation that says this is qualifying enough for you to come to work or not". "In the end, both of us are saying the same thing, which is that you need to come back to work".

NOTE: This is an *extraordinary* statement. Mr. Edwards is stating that my interim accommodations are being terminated and "who cares" what the explanation for that adverse decision is. This is effectively an *admission* of animus insofar as Mr. Edwards is admitting that there is not non-discriminatory justification for the adverse decision. Rather, he is effectively saying that the decision was made to terminate the interim accommodations, and it doesn't matter what explanation is offered to support that decision because, he implies, that explanation is a mere pretext for the decision. Also note that the repetition of "you need to come back to work" in the conversation is disconcerting because I *am* at work, and have been at work -- I am merely working via telework. Mr. Edwards' words strongly suggest that he views the accommodation as me not working, which would certainly be unlawful animus.

2:45 - 2:50 --- I point out that Mr. Eve's justification for terminating the interim accommodations and Mr. Edwards' justification are "two totally different explanations" and "one of those explanations [Mr. Eve's] is demonstrably untrue.

2:48 - 2:54 --- Mr. Edwards interrupts and states "It doesn't matter. Pick whoever one you think is true or whichever one you want to believe in but both of them are saying come back to work".

NOTE: Again, Mr. Edwards is implying that *neither* explanation is valid, but merely a pretext for terminating the interim accommodations and getting me to "come back to work". Otherwise, why would he be telling me to "just pick" an explanation, rather than telling me which explanation is correct? This statement, combined with the one immediately above, are irrefutable proof that both explanations for the adverse action (terminating the interim accommodations) are mere pretexts for unlawful discrimination based on their view that I need to "come back to work" because, apparently, they don't believe my disability is valid. That also renders the adverse decision retaliatory.

I must note that I have to wonder why my disability became less valid (and the justification for interim accommodations apparently ended) on 29 January when the only thing to change between 29 January and the start of accommodations on 1 July 2015 was that *more* medical support was received for my position in the form of the FOH opinion on 10 December. It makes no logical sense that the interim accommodations would be continued for seven months, and then be terminated without the Agency having any non-discriminatory adverse information to support the termination decision that it did not already have for most (or all) of the preceding
period. In other words, the only thing that seems to have changed in the seven months (other than getting the FOH opinion) is that Mr. Eve and Mr. Edwards have decided I have had enough "time off" and it's time to "come back to work". That motivation is by definition discriminatory since they are judging that my disability does not exist (without sufficient support for making that determination and, indeed, without that determination having been officially made, as Mr. Edwards' himself says later in the conversation), and retaliating against me for asserting the disability by revoking the interim accommodations.

3:00 - 3:12 --- I note that the arguments against the two explanations are totally different (in other words, they are mutually exclusive explanations -- one of them has to be untrue). I further note the argument against Mr. Eve's explanation is "not true" (because I cannot have been accommodated on 1 July 2015 for the Achilles' injury that didn't occur until 2 August), and the argument against Mr. Edwards' explanation is that it is "inconsistent with the law" (insofar as the Rehabilitation Act does not permit a non-physician to overrule the medical judgement of both my primary care physician and the FOH physician -- both of which found that my work environment could reasonably be expected to cause me anxiety).

3:13 - 3:15 --- Mr. Edwards states "Well argue it however you want to".

NOTE: Again, this statement supports the assertion that Mr. Edwards and Mr. Eve are simply fabricating explanations to support their unlawful adverse actions as this statement makes no sense if one of the explanation were valid as my arguments would need to be directed against the valid explanation. The explanation I challenge is only irrelevant if the accommodation is going to be revoked arbitrarily regardless of what explanation the Agency establishes as a pretext for the decision, and regardless of whether I successfully challenge that explanation. That is strong evidence of animus.

3:15 - 3:25 --- I ask to whom I appeal the adverse decision (to terminate the interim accommodations).

3:25 - 3:27 --- Mr. Edwards' states "You are the one not wanting to come back to work, that's what started the argument".

NOTE: See above, further evidence of animus, and continued disdain for my disabilities and the reasonable accommodation process -- not to mention a gross mischaracterization of the interim accommodations themselves (I am performing my assigned duties fully, merely on telework).

3:27 - 3:43 --- I point out that not wanting (and, indeed, being medically advised not to) be in the office is indeed the entire point of both the reasonable accommodation request, and the interim accommodations. I note that it is terrifying to be around people whom I am testifying against and that after two years, the physical and mental toll upon me was immense and I certainly don't want to go through that again.

3:45 - 3:47 --- Mr. Edwards states "I can't help you".

3:58 - --- I ask Mr. Edwards "What is the appeals process" for the adverse decision to revoke the interim accommodations. I noted that a decision has been made (on that issue) and communicated to me (however flawed those decision might be).

4:04 -4:07 --- Mr. Edwards interrupts and states "You are asking me for the appeals process on your boss telling you to come to work, and you don't want to come to work".

NOTE: Again, this is a gross distortion of the interim reasonable accommodation. Mr. Edwards was involved in the request for reasonable accommodation from the beginning (at least 17 July 2015), so he knows (or should know) that I requested accommodation of being allowed to telework full-time to avoid what my doctor calls a "hostile and unhealthy working environment" in his 31 July statement. Mr. Edwards' statements here and elsewhere in this conversation show what can only be called utter disdain for my anxiety disability, and the request
accommodation. Indeed, he is almost outright accusing me of being lazy and not wanting to work. That is about as clear cut example of disability discrimination and retaliation as I can imagine both in a vacuum, and in context.

4:10 - 4:13 --- I respond and state that there is an appeals process for the denial of accommodation.

4:14 - 4:27 --- Mr. Edwards responds and states that "You haven't been denied yet" and "Your request for accommodation, there has not been a decision made on it".

NOTE: This statement is inconsistent with Mr. Edwards' previous statement that interim accommodations were being revoked due to a lack of sufficient medical documentation. Further, if no decision has been made, then per DCAA Personnel Manual Chapter 69, Section 3.8(e) interim accommodations should continue until a decision has been rendered.

4:29: - 4:38 --- I state "You have provided interim accommodation, now you are revoking that. That is an action...and that action is subject to appeal. So who do you appeal it to?"

4:40 - 4:45 --- Mr. Edwards states that the adverse action to revoke the interim accommodations is "not appealable".

4:46 - 4:50 --- I state that you have to be able to appeal the withdrawal of interim accommodations.

5:00 - --- Mr. Edwards states, in relation to my assertion that the withdrawal of interim accommodation are appeal "if you find it, let me know".

NOTE: I did not state the citation during our conversation, but the correct citation is the due process clause of the Constitution. The Agency cannot extend interim accommodations, then revoke them, without providing due process. The lack of an appeals process makes the revocation decision unilateral, arbitrary, and capricious -- in other words the opposite of due process. I did, between 5:06 and 5:27 give an example to illustrate why an appeal needed to be available to satisfy due process.

5:28 - 5:30 --- Mr. Edwards states "you can appeal that through the chain of command".

5:31 - 5:36 --- I noted that it was my understanding in EEO matters like reasonable accommodation that the chain of command was excluded from the appeals/complaints process.

5:37 - 5:53 --- Mr. Edwards (accurately) states that the reasonable accommodation process is separate from the EEO complaints process.

NOTE: This is a true statement, but one that does not address issue of how to undertake an appeal of the adverse action (termination of the interim accommodations).

5:54 - 6:58 --- Mr. Edwards goes on to state that "I do not have to remain neutral in the reasonable accommodation process". He also notes that he can "tell you things" that would be unacceptable under the EEO process, and that he is not forbidden from "taking sides on things". He then goes through a listing of the "resources" upon which he relies and stated that the "clock" has stopped now that they have requested medical documentation from me.

NOTE: I find these statements by Mr. Edwards very distributing, especially in the overall context of the conversation, because he seems to be saying that he can take sides for or against me at a whim -- which is both inaccurate (the Agency is required to be neutral on disability and accommodation matters -- that is the *entire* point of the Rehabilitation Act) and frankly threatening. I am also concerned about Mr. Edwards' reference to the "clock" stopping, given the seven month delay that has already occurred in just getting me this request for documentation.
7:00 - 7:29 --- I close this half of the conversation by stating that I will "talk to my doctors" but that my doctors had previously stated that for my own health I could not return to the office environment, and the best way to protect my legal rights without forfeiting my health would be to resign under protest and sue for constructive termination. I noted that such a suit is time consuming, and expensive (not to mention stressful) "but I don't really have any options other than to subject myself to a hostile environment, and that is not something I am inclined to do again having lived through it for two and a half years."

At bottom, the attached provides significant direct and indirect evidence that the Agency is engaging in discrimination against me for my disability, and retaliating against me for participating in the reasonable accommodation process. This evidence fits into a pattern of misconduct substantiated by other evidence in the record. In particular, Mr. Eve and Mr. Edwards both express significant frustration that I have remained on full-time telework as an interim accommodation since 1 July 2015, and Mr. Edwards makes it clear that they want me to "come back to work". Because Mr. Eve and Mr. Edwards state (unequivocally) that they do not believe I am disabled (and assertion with which the rest of my chain of command appears to also believe), it is obvious that their equally invalid yet contradictory explanations for the adverse action (terminating the interim accommodations) are merely a pretext to show disdain for my disability and the reasonable accommodation process by prejudging the validity of my disability, substituting their unqualified judgement regarding my disability for that of my (and the Agency's own FOH) physician, and the adverse action itself is retaliatory because it is facially discriminatory, does not have a non-discriminatory justification (at least not one that didn't exist months ago), and strong evidence exists that the justifications that were given were mere pretext.

Therefore, I conclude that this evidence supports my EEO complaint, and I provide it to you for that purpose.

Please forgive me any typos, my supervisor only granted a total of three hours today to work on this EEO complaint so I did not have time for to do much proofreading. On that subject, please advise what a reasonable amount of official time might be (at least to begin with) given the size and complexity of this case so that I can request further time from my supervisor as required.

Regards,

J. Kirk McGill

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As an addendum to my emails on this subject the past two days -- after discussion with the independent psychologist and the EEOC I have some additional information to communicate to you.

DCAA's position *now* appears to be that I was never given temporary accommodation for the claimed anxiety disability submitted on 1 July (2 July according to DCAA). It is now 5 February -- seven months later. I provided medical information to DCAA on 31 July (2 August according to DCAA), DCAA sent the case to FOH for a second opinion on 28 September, received a response on 10 December, and notified me that it needed further medical documentation on 19 January (giving me until 15 February to provide all but the mental health evaluation, which I have until 15 March to provide). As noted in my email of 2 February, this conduct violates virtually every time limitation set out in DCAA policy -- and as the very least constitutes a "delay" in the processing of the claim.

DCAA Personnel Manual, Chapter 69, Section 3.8(e) states:

"If a delay is attributable to the need to obtain or evaluate medical documentation and the Agency has not yet determined that the individual is entitled to an accommodation, an accommodation may be provided on a temporary basis pending a decision on the accommodation request."

DCAA appears to be arguing that the use of the word "may" in the policy denotes that providing interim accommodations is entirely discretionary, and it simply chose (and continues to choose) not to provide any.

However, the EEOC's binding policy guidance (http://www.eeoc.gov/policy/docs/accommodation_procedures.html) states:

"If there is a delay, the agency must investigate whether there are temporary measures that could be taken to assist the individual with a disability. An agency could consider, for example, a temporary job restructuring or the use of equipment that might permit the individual to perform some of the functions of his/her job."

The use of the term "must" in the EEOC guidance contradicts DCAA's policy which merely uses the term "may". Therefore, DCAA's policy is itself a de facto EEO violation, and its specific failure in my case to investigate the possibility of providing interim accommodation, during a now more than seven month delay, pending a final accommodation decision, is also an EEO violation -- especially as only a small portion of that delay was to receive additional information from me, as opposed to delays caused by the Agency.

Additionally, and as also previously noted, DCAA continues to ignore the medical evidence presented simply because it does not like what that medical evidence says. DCAA's blatant refusal to consider the medical opinion of my primary care physician, which is substantially supported by the opinion of DCAA's own physician at FOH, is strong evidence of discriminatory animus. However, out of an abundance of reasonableness on my part, I have
requested that the independent psychologist issue an opinion (based on the testing to date) on this matter as well. If and when that is provided I will pass it on to you.

At bottom, DCAA has through its negligence and/or deliberate malfeasance caused a seven month delay in the processing of my request for reasonable accommodation of my anxiety disability pursuant to the Rehabilitation Act. It unequivocally states that it has provided no interim accommodations during that period for that condition. This is not lawful.

I bring this to your attention so that this unlawful and damaging (to my health) situation may be corrected immediately. Given that I am being ordered to report to (what my physician has stated to you in writing) is a hostile and unhealthy working environment on Tuesday 9 February (and Monday 8 February is my regular day off) -- DCAA has until 4:00 PM Mountain Time today to provide interim accommodations (full-time telework) until a final decision is made on the accommodations, and notify me of this determination in writing as required by DCAA’s policies. If it fails to do so, I will consider the DCAA management officials addressed by this missive to have engaged in a deliberate violation of the Rehabilitation Act by blatantly flaunting the reasonable accommodation policies, acting in bad faith and from a discriminatory animus (i.e. that I am not disabled), and making determinations and decisions in this matter that are arbitrary, capricious and contrary to rule & law -- and I will pursue an EEO complaint and/or other legal action to that effect.

Given that DCAA's conduct violates rule, law or regulation (e.g. the EEOC binding guidance), is abusive, and (if applied to all DCAA employees) represents a substantial threat to their health and safety, I report this conduct to you pursuant to 5 U.S.C. § 2302.

Regards,

J. Kirk McGill

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GROSS MISMANAGEMENT;
GROSS WASTE OF FUNDS;
ABUSE OF AUTHORITY;
VIOLATION(S) OF LAW, RULE, AND REGULATION;
NONCOMPLIANCE WITH THE TERMS OF GRANT AGREEMENTS;
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Allegation:
That senior officials of the Defense Contract Audit Agency deliberately and unlawfully ordered substantiated findings of misconduct by Government contractors and grantees removed from multiple audit reports, attempted to coerce the Auditor-in-Charge and successfully coerced the Supervisory Auditor and Engagement Partner into signing off on the improper removals, retaliated against the Auditor-in-Charge and Engagement Partner for reporting the wrongdoing to the appropriate watchdogs in violation of the Whistleblower Protection Act; and attempted to intimidate against the Auditor-in-Charge into withdrawing his allegations to law enforcement and the Congress and, when that failed, retaliated against him.

Date of Disclosure & Referral:
Monday 27 April 2015

Principal Disclosing & Referring Official:
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Parties Involved:
Private Entities:
National Ecological Observatory Network, Inc. (“NEON”)

State Government Entities:
State of Colorado
Colorado School of Mines (“CSM”)
Public Employees’ Retirement Association (“PERA”)

United States Federal Government
Executive Branch Departments & Agencies:
United States Department of Defense (“DoD”)
Office of the Inspector General (“DoDIG”)
Defense Contract Audit Agency (“DCAA”)
Headquarters (“HQ”)
Office of the Inspector General (“DCAA-IG”)
Central Region Office (“Central Region”)

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Field Office No. 03121 - Denver Branch Office (“DBO”)
Field Office No. 03151 - Rocky Mountain Branch Office (“RMBO”)
Mid-Atlantic Region Office (“Mid-Atlantic”)
North-Eastern Region Office (“Northeastern”, “NER” or “North-Eastern”)
Defense Contract Management Agency (“DCMA”)
Office of Naval Research (“ONR”)

United States Department of Health and Human Services (“HHS”)
Office of the Inspector General (“HHS-IG”)
Centers for Medicare & Medicaid Services (“CMS”)
Government Accountability Office (“GAO”)
Council of the Inspectors General on Integrity & Efficiency (“CIGIE”)
Office of the Special Counsel (“OSC”)
Office of the Inspector General, National Science Foundation (“NSF-IG”)

**Legislative Branch Members & Committees:**
United States Senate
   Homeland Security and Governmental Affairs Committee (“HSGAC”)
      Permanent Subcommittee on Investigations
   Committee on the Judiciary
   Committee on Commerce, Science & Transportation (“SCST”)
United States House of Representatives
   Committee on Science, Space and, Technology (“HSST”)
      Subcommittee on Research & Technology
      Subcommittee on Oversight

**Alleged Laws Violated:**
05 U.S.C. § 2302 *Prohibited Personnel Practices*
05 U.S.C. § 7211 *Lloyd-La Follette Act of 1912*
18 U.S.C. § 0207 *Restrictions on former officers, employees, and elected officials of the executive and legislative branches*
18 U.S.C. § 0286 *Conspiracy to defraud the Government with respect to claims*
18 U.S.C. § 0371 *Conspiracy to Commit Offense or to Defraud United States*
18 U.S.C. § 1001 *Statements or Entries Generally*
18 U.S.C. § 1002 *Possession of false papers to defraud United States*
18 U.S.C. § 1516 *Obstruction of a Federal Audit*
18 U.S.C. § 1031 *Major Fraud against the United States*
18 U.S.C. § 1505 *Obstruction of Proceedings before Departments, Agencies, and Committees*
18 U.S.C. § 1512 *Tampering with a witness, victim, or an informant*
18 U.S.C. § 1512 *Retaliating against a witness, victim, or an informant*
18 U.S.C. § 1519 *Destruction, Alteration, or Falsification of Records in Federal Investigations and Bankruptcy*
18 U.S.C. § 1621 *Perjury generally*
18 U.S.C. § 1622 *Subornation of perjury*
18 U.S.C. § 1913 *Lobbying with appropriated moneys*
31 U.S.C. § 1352 *Byrd Anti-Lobbying Amendment*

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**FOR OFFICIAL USE ONLY**
I. Overview

My name is J. Kirk McGill. I have at present the honor to be a Senior Federal Auditor with the United States Department of Defense - Defense Contract Audit Agency ("DCAA" or the "Agency") currently assigned to the Rocky Mountain Branch Office ("RMBO").

This referral and disclosure involves two separate sets of audits conducted by DCAA between 2011 and the present. This referral and disclosure does not address retaliation related to non-attest services performed in relation to Colorado Altitude Training, LLC as this issue will be covered under separate cover at a later date. This referral and disclosure also does not address issues related to the issuance of the 20 April 2015 independence disclosure, which will also be issued under separate cover. Finally, other than a brief overview of a couple of issues, this report does not address activities after 3 February 2015. Information regarding the period beginning on 4 February 2015 will be made under separate cover.

The first set of audits involves Federal grant funding for major research equipment and facilities construction projects across the United States, including (as of interest here) a major nation-wide project – the National Ecological Observatory Network, Inc. ("NEON") headquartered in Boulder, Colorado. The grants are awarded and overseen by the National Science Foundation ("NSF"). The specific grant in question has a present value of approximately $433.7 million. The Office of the Inspector General of the National Science Foundation ("NSF-IG" or "NSF-OIG") requested the assistance of DCAA in examining the accounting practices of the Colorado grantee due to suspicion of unlawful activity. I was assigned to lead the audit team based out of the Denver Branch Office ("DBO").

During the course of the engagement, my team discovered that the grantee was illegally funneling millions of dollars of taxpayer money into unlawful activities including lobbying, extravagant Christmas parties, employee gifts, and the like -- all of which were paid 100% by the taxpayer. We also discovered that National Science Foundation was fully aware that the funds were being spent illegally (having been notified in writing of the grantees intended use of the funds), but not only took no action to prevent the practice, but in fact actively colluded with the grantee to obtain funds for the explicit purpose of paying these unlawful costs. Our draft findings were reviewed by two levels of Defense Contract Audit Agency line management, which concurred with my team's findings and recommended action against both the grantee and the National Science Foundation. The National Science Foundation Inspector General concurred in the findings. In April 2015 the Office of Management and Budget also substantively concurred with the findings. Congressional legislation enshrining the findings in law (at least as to the NSF) is currently before the House Committee on Science, Space and Technology.

Unfortunately, over the past eighteen months, upper-level Defense Contract Audit Agency management has undertaken a systematic campaign to cover-up the audit results before the report could be issued. The final report issued in late 2014 makes no mention of the allegations of fraud and the working paper package supporting the report has been scrubbed of all derogatory findings supporting the allegations of fraud. Even more concerning, myself and my immediate superiors were threatened with disciplinary action if we did not sign off on the false report. While I refused to do so, my first and second line supervisors did in fact sign off on the final report even though they documented (in writing) that they believed the report to be
false. Several employees at the DBO, including both my second line supervisor and myself, suffered retaliation & reprisal for our actions.

Further, the then-Director of DCAA was personally aware of the issues and took no action to prevent his subordinates from ordering the cover-up and engaging in the reprisal. The current director (then-Deputy Director) was directly involved in the cover-up and reprisal.

The second audit involves Federal grant funding for the Colorado School of Mines (“CSM”). During that audit, my team concluded that the Federal Government (“USFG” or “Government”) had paid millions of dollars in unallowable (unlawful) pension costs to CSM. Again, these results were approved by my first and second line supervisors and, again, they were ordered removed by senior DCAA management.

Therefore, this situation has an eerie similarity to the situation DCAA faced in 2008/2009 when reports surfaced that indicated that DCAA management unlawfully interfered in audits to whitewash negative findings and cover up contract misconduct. The resulting Congressional investigation lead to the removal of the DCAA Director and major changes in DCAA staffing and policies. Unfortunately, it appears that the same thing is happening again.

As a result, I reported the matter to several inspectors general and multiple members and committees of the Congress. Investigations by both groups are ongoing.

At bottom, this referral & disclosure is intended to disclose and refer not only the alleged misconduct at the two entities (NEON and CSM) that were audited, and the Government agencies charged with their oversight – but also the alleged misconduct by Government officials in covering up those findings, and retaliating against myself and others for disclosing the allegations (i.e. by whistleblowing).

This document is written primarily for those who already possess a working knowledge of the background of this matter and is much abridged in many areas. Therefore, those without such working knowledge will likely need to request further information to properly understand the facts and circumstances outlined below.

Next, note that this document provides only a brief outline of the issues. Due to the length and complexity of said issues, significant documentation exists to support the summary below that is not included herein for the sake of brevity.

Finally, as this document was prepared in some haste in places, I apologize in advance for any grammatical errors or internal inconsistencies I was unable to resolve in the time available. Revisions will be made to correct these issues when more time is available to do so.
II. Background

a. Previous Disclosures
Due to the complexity of these issues and the length of time involved, a number of other disclosures regarding the issues discussed herein, or related to the same, have already been made. The purpose of those disclosures were to provide the information to the appropriate authorities without delay. The purpose of this report is to consolidate all of those reports, with the benefit of hindsight, into a single omnibus disclosure.

On 20 April 2015, I concluded that DCAA was not independent of either of its clients (the contractors or the rest of the Government) as required by rule, law, and the standards of the auditing profession. That disclosure was concerned with the alleged violations of the independence framework and Integrity and Objectivity Rule of the AICPA, rather than the alleged misconduct by DCAA management that resulted from those violations. The latter is the subject of this report.

b. Background – National Ecological Observatory Network
The National Ecological Observatory Network, Inc. is an Internal Revenue Code § 501(c)(3) nonprofit corporation registered in the State of Colorado. NEON is substantively 100% funded by the United States Federal Government through cooperative agreements authorized by 31 U.S.C. § 6305 and granted under the auspices of the National Science Foundation.

NEON's mission is to design and construct a continent-wide network of ecological observatories by 2017, and then operate the observatories for a period of at least 30 years to gather ecological data, analyze that data in real-time, and make both the raw data and NEON's analysis of the same available for scientific research by third parties. The NEON project officially began in 2000 with a series of workshops that continued until 2005. NEON, Inc. was founded in 2006 to run the NEON Project, and an initial plan for NEON was completed in 2006. Over the next five years the NEON design, plan and budget were formally reviewed and revised multiple times until NSF, the National Science Board and Congress approved final funding for NEON, Inc. to build NEON in 2011. NEON is currently in the construction phase, in which it will build out all 106 field sites as well as the information infrastructure needed to gather data and metadata from sensors and field sampling, ensure data quality, process the information into data products, and deliver those products to users via an online portal.

This mission was specifically created by the NSF, and NEON was specifically created to perform that mission. Its sole reason for existence is to complete this project. Indeed, the term “NEON” was coined by the NSF. The takeaway here is that NEON was not and is not an independent arms-length Government-funded construction project as is usual in Federal grants and contracts. Instead, it may reasonably be described as nearly an arm of the NSF, and enjoys a very close relationship with the NSF.
c. **Background – Colorado School of Mines**

The Colorado School of Mines is a public institution of higher education under the State of Colorado. It is based in Golden, Colorado and receives extensive (~$30 million) Federal grant assistance. CSM’s largest contributor is DoD so its oversight falls to DCAA and the Office of Naval Research (“ONR”). DCAA’s audit activities at issue here were limited to CSM’s fringe rates and disclosure statements.

### III. Timeline of Events

A brief timeline of events related to the NEON and CSM engagements follows. This timeline is written primarily in the present tense (i.e. as the events occurred).

Notes linking events in the timeline to past or future events is formatted in **blue**.

Notes regarding allegations of fraud, waste, abuse, violations of rule or law, of evidence supporting any of the these related to NEON, or the NSF is formatted as **green**.

Notes regarding allegations of fraud, waste, abuse, violations of rule or law, of evidence supporting any of the these related to CSM, ONR, the Department of Health and Human Services, the University of Colorado, or any other public or private institution of higher education is formatted as **purple**.

Notes regarding allegations of fraud, waste, abuse, violations of rule or law, of evidence supporting any of the these related to DCAA, or any other Federal Government entity (other than those above) is formatted as **red**.

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**2001 – 2005:** NEON project is planned.

**2006:** NEON, Inc. created to run NEON project. NSF grants awarded to NEON to fund the design phase of the project.

Several of NEON’s board members are former Federal government employees, including:

- Dr. James Collins, NEON Chairman. Dr. Collins was Director of the Population Biology and Physiological Ecology program at the National Science Foundation (NSF) from 1985 to 1986. From 1989 to 2002 he was Chair of Arizona State University's Zoology, and then Biology Departments. He served as NSF’s Assistant Director for Biological Sciences from 2005 to 2009. He was Chairman, Board of Directors, Declining Amphibian Populations Task Force from 2003 to 2006 -- overlapping his NSF employment. He served as Consultant to the Office of the Director of the National Science Foundation from 2009 to 2010. He served as NEON's Chairman from 2011 to the present.

As NSF Assistant Director for Biological Sciences from 2005 to 2009, Dr. Collins was heavily involved with the design of the NEON project, and was also heavily involved with the initial $433

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million funding grants, which necessarily included the initial award of “management fee” in late 2008. Dr. Collins confirmed in sworn written statements in the House Committee on Science, Space and Technology in March 2015 that he was the NSF official responsible for approving the NEON project and the initial NEON budget. Although the NSF Director had the “final” say on both issues, Dr. Collins’s recommendations carried great weight.

Dr. Collins ceased his NSF employment (the consulting position) in 2010 and joined NEON as its Chairman of the Board in 2011.

Based on this article:
Dr. Collins was on leave from ASU while at the NSF under the terms of the Intergovernmental Personnel Act. The provisions of the Act notwithstanding, Dr. Collins was legally employed at an institution that receives millions of dollars in Federal grants, including significant grants from the NSF, while employed in NSF senior management. According to this same article, he actively worked on at least one ASU project and collaborated with at least one ASU employee while working for the NSF. He returned from leave to ASU immediately following the end of his NSF tenure.

According to his CV, he received millions of dollars of NSF grants, in addition to his more than million dollar grant under the Act, while he was working at the NSF. Specifically, he received the following grants that overlap his NSF employment:

National Science Foundation grant #DEB 0213851: IRCEB (Integrated Research Challenges in Environmental Biology) Emerging wildlife diseases: Threats to amphibian biodiversity. $3,000,000 (2002 - 2010) [Project Director (JPC); proposal written with 26 collaborators].

National Science Foundation grant #0527937: Social Dimensions of Engineering, Science, and Technology (SDEST) program: Ecological ethics: constructing a professional ethics for ecologists and biodiversity managers. $67,000. (2005-07) [with B. Minteer].

Again, both of these grants overlap his NSF employment, and are worth more than $3 million.

Dr. Collins currently receives grants from the NSF for his own research separate from NEON, including:

National Science Foundation grant # SES-1127611: Establishing an STS Informatics Infrastructure and Training Program. $98,000. (2011-2012) [with J. Maienschein, C. Norton, H. Miller, and M. Laubichler].

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National Science Foundation Doctoral Dissertation Improvement Grant (DDIG) #DEB 1209178: Iron availability and dynamics of an emerging infectious disease: Can a micronutrient cause macro-level outcomes? $15,000 (2012-14) [proposal prepared by Adrienne Zillmann, doctoral candidate].


Therefore, NEON’s Chairman Dr. Collins had and has, at least perceptually, clear conflicts of interest between his former NSF employment, his current position as NEON Chairman, and his own grants.

• Dr. Mark Abbott, Director. Dr. Abbott was on the National Science Board (which is basically the board of directors for NSF) from 2006 to 2013 – right in the middle of NEON’s design and initial operations. He has also served as an advisor to the Office of Naval Research (U.S. Department of Defense) and NSF.

• Dr. James Gosz, Director. Dr. Gosz has extensive Government service. On three occasions he worked at the National Science Foundation as Program Director (1984 - 86) Division Director in Environmental Biology (1993 - 95) and Senior Program Director in the Experimental Program to Stimulate Competitive Research (“EPSCoR”) (2005 - 2007). The latter period overlaps with the design phase of the NEON project.

• Margaret Strand, Esq., Director. Ms. Strand was Chief of the Environmental Defense Section in the U.S. Justice Department, Environmental and Natural Resources Division, from 1984 to 1991, having served as a Justice Department attorney since 1976. She worked on federal environmental policy issues involving Congress and the Executive branch, including the White House, the Office of Management and Budget, and the Council on Environmental Quality. She works regularly with federal agencies and Congressional offices on matters of environmental policy.

Several other potential conflicts of interest are worthy of note:

• Ten of fourteen NEON Directors work for universities – nine of them public (making them state employees).

• All ten of NEON’s university-employed Directors work for universities that receive extensive NSF funding, as well as other Government grants.
• At least five of the fourteen NEON Directors (Collins, Chen, Gosz, Stafford and Ward) are either currently receiving NSF grants, or working on projects that are NSF funded (not counting NSF grants to universities).

• At least six NEON Director (Frey + the five immediately above) received NSF grants at some point in their careers, even if they are not receiving any now.

At bottom, the majority of NEON’s Board of Directors (ten of fourteen) are employed by entities that receive extensive NSF funding – and at least half of NEON’s Board of Directors (Collins, Abbott, Gosz, Chen, Stafford, Ward and Frey) have received or are receiving grants personally from the NSF, are working or have worked on NSF-funded projects (in addition to NEON), or actually worked for the NSF itself at a senior level at some point in their careers.

• NEON Chief Executive Officer Dr. Russ Lea. Dr. Lea was vice president for research at the University of South Alabama and had, therefore, deep professional relationships with senior management at the NSF, including Dr. Collins. Many other senior NEON management officials went directly from state and Federal government service to NEON without an appreciable break in service. Further, some senior NEON management officials, like Dr. Collins, actually served as NSF officials on the NEON project before joining that project. Because NEON’s grants from the NSF are “cooperative agreements”, NEON and the NSF appears to argue that a Federal official that worked on the NEON project whilst in Federal service quitting Federal service and going straight to work for NEON is not unlawful – even if that new NEON employee was in a position as a Government official to influence NEON’s grant administration, or did in fact influence NEON’s grant administration (such as Dr. Collins giving preliminary approval to the project and its budget).

It is unclear how (or, more importantly, if) NEON and the NSF were able to avoid the application of 18 U.S.C. § 207. That said, oversight of that statute does not lie with DCAA, so we did not specifically inquire into the matter as part of our audits. That said, it is important to understand the incestuous nature of NSF and NEON’s relationship as it heavily influenced our assessment of the relationship between NEON and the NSF, and helps explain some of the events associated with this case. It is also likely worthy of further investigation.

January 2008: NEON goes into full operations. At this point, NEON is operating under construction cooperative agreements under NSF’s Major Research Equipment and Facilities Construction (“MREFC”) program because operations have not yet begun. NEON’s initial grant(s) are cost reimbursable cooperative agreements, with no provision for profit as NEON is, as noted above, a nonprofit company. Therefore, NEON could lawfully receive reimbursements only for “allowable” costs. The cost allowability regulations for nonprofits like NON are located at 2 CFR § 230 (former OMB Circular A-122).

Note: As of 2015, NEON has both MREFC grants (for completing the observatory network’s construction) and Operations and Management (“O&M”) grants (for beginning observatory operations).
January – November 2008: NEON incurs costs for which reimbursement is prohibited by rule (2 CFR § 230) and law (e.g. the Byrd Anti-Lobbying Amendment). Because NEON is effectively 100% Federally funded and receives (as a nonprofit) no profit (defined as any amount in excess of allowable cost), it does not have the ability to pay any costs for which reimbursement by the Federal Government is prohibited by rule or law. Nevertheless, it appears that NEON requested and received payment from the NSF for these costs and booked them as allowable costs.

At some point, NSF took official notice of some or all of these unlawful reimbursements. Rather than require NEON to repay the costs (which, critically, would be impossible since NEON had no funds with which to repay the costs, other than other Federal funds), the NSF directs NEON to request a “management fee” to cover the costs.

Management fees in the for-profit arena are simply profit, and are explicitly authorized by the Federal Acquisition Regulations (48 CFR Chapters 1-99). However, 2 CFR § 230 explicitly excludes management fees or any amount in excess of allowable costs from coverage under that regulation. The reason for this exclusion is readily apparent: the purpose of profit is to incentivize performance. Such incentivizing is needed when contracting with for-profit entities because their primary purpose is to generate profit, and they are unlikely to perform on Government grants and contracts for only reimbursement of cost. Nonprofits on the other hand do not have profit as a motivation; indeed, they are expressly prohibited from having profit as a primary motive. Instead, nonprofits primary mission must be public service (see, e.g. 26 U.S.C. § 501(c)(3)), and in exchange for this service they are exempt from income taxation at the state and Federal levels.

Nevertheless, the NSF and other Federal departments and agencies (including DoD) have asserted since at least the 1960s a unilateral right to pay management fees to nonprofits explicitly to cover unallowable costs, despite no statute or regulation authorizing the practice. The reason for this move is also readily apparent: a for-profit contractor’s profit on Federal contracts becomes the contractor’s money when received, and the contractor is generally free to use profit in any way it likes (unless prohibited by other rule or law), including paying for unallowable costs.

Note: The United States Federal Government operates under an appropriations system. Therefore, the Government is Constitutionally forbidden from spending money on anything unless explicitly authorized by an act of Congress and signed by the President. Such an authorization might be funding for an agency subject to general spending laws, or funding for a specific project – as is the case for NEON. Regardless, Federal funds cannot be expended without authorization.

There is no authorization to spend Government funds on profit or fee for nonprofits – unlike their for-profit counterparts for which profit is explicitly authorized in rule and law. Therefore, the use of Government funds to pay an amount in excess of allowable costs for nonprofits is illegal – not because rule or law specifically prohibits the practice, but because rule or law does not specifically authorize the practice – and such authorization is a necessary prerequisite to spending taxpayer money.
To put it another way – rule and law excludes payment of profit, fees, or any amount in excess of allowable cost to nonprofits. 2 CFR § 230.10(b) states:

The principles deal with the subject of cost determination, and make no attempt to identify the circumstances or dictate the extent of agency and non-profit organization participation in the financing of a particular project. Provision for profit or other increment above cost is outside the scope of this part.

No other rule or law addresses “profit or other increment above cost” for nonprofits – again, unlike for-profits which have extensive regulations addressing profit on Government contracts and agreements. Therefore, the payment of “profit or other increment above cost” is not authorized by rule or law for nonprofits.

The NSF and other agencies appear to take this exclusion as consent for the payment of “profit or other increment above cost” to nonprofits. However, in an appropriations system (and, indeed, law in general) silence is not equivalent to consent.

Thus, by awarding a nonprofit grantee a profit (fee), the nonprofit can, under this interpretation, use the profit (fee) to pay its unallowable costs that it would otherwise be unable to incur if it has no other source of income. Effectively, this move permits nonprofits to receive what is substantively an unlawful reimbursement of unallowable costs under the guise of a “fee” that itself lacks authority in rule or law.

Note: It appears that NEON billed the NSF directly for unallowable costs prior to its receipt of the management fee. These billings may have occurred between 2005 and 2009. It is not known whether NEON transferred these costs to the management fee after they had already been incurred and paid for by the NSF, or if those costs are still on the books as direct charges. In either case, the act would be unlawful because unallowable costs incurred and billed directly to the Government violate 2 CFR § 230 and must be repaid to the Government. An after-the-fact transfer, necessarily with the knowledge and consent of the NSF evades 2 CFR § 230 and is likely fraudulent – leaving the costs on the book with or without the knowledge and consent of the NSF directly violates 2 CFR § 230 and is unquestionably fraudulent.

8 December 2008: In accordance with the NSF’s instructions, NEON’s senior management (lead by its Chief Financial Officer Tom Sheldon) sends a letter requesting a "management fee" to pay for unallowable costs already expended for FY 2008 and booked as allowable costs (as noted above). NSF grants the request and pays the fee. It appears that NEON transfers the unallowable costs that were improperly booked and billed as allowable costs charged directly to its grants, to the "management fee" as indirect costs. NSF also grants a management fee equal to 1/2 of 1% of NEON's total grants for future years.

Note: it is unclear whether NEON incurred unallowable costs in 2005 – 2008 and, if so, how it received payment for those costs. What is certain is that in 2010 and 2012 NEON transferred unallowable costs that were reimbursed by the NSF as allowable costs to the management fee after it had already received payment from the NSF for those expenditures as costs.
Note: through June 2014 NEON expended approximately $1.8 million in management fees.

2008 – 2011: The NSF conducts one or more Business Systems Reviews (“BSR”) on NEON. These reviews include review of all of NEON’s policies and procedures. Included in the policies and procedures reviewed were explicit statements by NEON management that NEON employees could spend Federal grant money on alcohol, entertainment, lobbying, and the like. Indeed, NEON’s Policies and Procedures Manual included a form that NEON employees could (and did) fill out to receive authorization from NEON management to spend Federal funds on certain expenditures. The expenditures authorized by the form included alcohol (on premises or off premises), entertainment, and lobbying – with convenient checkboxes provided for each of these items. The form specifically stated that all of these costs were “unallowable”, but could be charged to the Government as “management fee”. NSF did not take issue with NEON’s use of management fee, its policies and procedures governing the same, nor its proposed use of fee in future.

Note: Indeed, NSF took no action related to the fee until after the first Congressional hearing on 3 December 2014. Yet, by its own statements in the 2011 BSR it fully reviewed the Policies and Procedures Manual which contained explicit references to the use of fee to pay lobbying, alcohol and entertainment/employee welfare expenses. Therefore, the NSF either knew no later than 2011 that NEON had spent fee on these expressly unallowable expenses, lied in the BSR about reviewing the Policies and Procedures Manual, or failed to note NEON’s policies regarding the use of fee – which, given the blatant nature of NEON’s policies on fee, would represent a mind-boggling level of incompetence. In any case, the NSF knew (or should have known) no later than 2011 that NEON had and intended to continue to spend taxpayer money on lobbying, alcohol, and entertainment – but took no action to address this at the very least wasteful, if not fraudulent, use of taxpayer funds until Congress took notice in 2014.

2011 – 2012: The Office of the Inspector General of the National Science Foundation (“NSF-OIG” or “NSF-IG”) became concerned that NSF’s Business Systems Review and proposal review process for MREFC projects did not adequately identify potential noncompliances with rule or law. Although the primary $433.7 million NEON construction grant had already been awarded, the NSF-IG requested that DCAA conduct an independent audit of the proposal to determine whether NSF properly awarded the grant. To put it another way, NSF-IG wanted to know whether an independent auditor would have found the proposal an adequate basis for negotiating a fair and reasonable price to the Government.

DCAA twice rejected the proposal as totally inadequate for audit. This in and of itself created serious questions about the NSF’s review process since a $433 million proposal it had already approved was so inadequate that DCAA could not even attempt an audit.

Finally, upon a third submission in 2012, DCAA conducted a proposal examination out of the Denver Branch Office. The auditor-in-charge of that engagement was Senior Auditor Dan Gerleve, CPA (GS-12), a 27-year veteran of the Agency (all in the field) – making him one of the most experienced field auditors in the entire Federal Government.

28 September 2012: DCAA issues its final audit report on the proposal.
The report ultimately questioned $102.1 million and was unable to substantiate (so-called “unsupported costs”) $52.3 million. In total, DCAA’s report questions or unsupported nearly 36% of the proposed costs, which resulted in an adverse opinion in the report – finding that the proposal was NOT a reasonable basis to negotiate a fair and reasonable price to the Government.

The proposal audit report finds that the stated purpose of the management fee was and is to pay unallowable costs and, therefore, that it was and is nothing more than the unlawful reimbursement of unallowable costs. It therefore recommends disallowing the fee in its entirety.

The proposal audit report finds that NEON’s proposed contingency funding is either not compliant with rule and law, or not supported by sufficient evidence.

The proposal audit report was approved by Mr. Gerleve’s supervisor Mr. Bill Allsopp, CPA (GS-13); his Field Audit Office Manager Mr. Allen Jones, CPA (GS-14); and Central Region Regional Audit Manager Angela Moomand (GS-15) (the latter in consultation with Central Region management and DCAA Headquarters).

Later on 28 September 2012: NSF-IG accepts the report from DCAA.

NSF-IG received an advance copy of the final report and, upon its own review performed with Generally Accepted Government Auditing Standards, officially concurs with the findings, and issues a report, including the DCAA report as an attachment, to NSF senior management. As worthy of note here, the NSF-IG report stated that the audit found that “NEON proposed a management fee … to cover expressly unallowable costs in noncompliance with OMB cost principles.”

Note: Two other DCAA audits completed at about the same time of the second and third largest NSF MREFC project proposals at the time (NEON being the largest) completed by two different DCAA offices also questioned or unsupported approximately 1/3 of each entity’s proposed costs and issues adverse opinions. Therefore, DCAA found (and the NSF-IG concurred) that none of NSF’s three largest construction project proposals were suitable for negotiation. The NSF made no modifications to the NEON grants or, apparently, to any of the grants in response to the DCAA/NSF-IG audits.

February 2013: Apparently recognizing that little could be done about the proposals, since the grants had already been issued and the NSF declined to make any substantive modifications, the NSF-IG requests that DCAA perform modified post-award accounting system examinations of multiple major projects at the NSF, including NEON. To ensure independence, Denver Branch Office FAO Manager Allen Jones assigned a new team to conduct this examination. I was assigned as Auditor-in-Charge (also called the “lead” auditor), and Supervisory Auditor Michael Quant, CPA (GS-13) was assigned to supervise. Note: the engagement was placed under DCAA Assignment No. 03121-2013J17741001. FAO Assistant for Quality Angie Vaill, CPA (GS-13) was assigned to provide support, and Central Region Regional Audit Manager Jerry McAfee, CPA (GS-15) replaced Ms. Moomand as the RAM in charge of the Denver Branch Office.
Mid-February - April 2013: Fieldwork at NEON.

The DBO team independently examines the management fee issue. While we ultimately substantiate the proposal audit team’s conclusion that the fee is simply a ‘backdoor’ reimbursement of unallowable costs, we go a step further and examine the actual expenses made by NEON during a six-month period between FY 2012 and FY 2013. We find that NEON spent over $120,000 on lobbying, $25,000 on an office Christmas Party (for about 175 employees, a cost of nearly $150 per employee), and thousands of dollars on alcohol, foreign travel in excess of per diem and/or without benefit to the Government, logoed apparel for NEON employees, and other expressly unallowable costs under 2 CFR § 230 during this period.

Note: Few of the expenditures appear necessary for NEON to perform on its NSF grants, and all are expressly unallowable by operation of law. Further, NEON labels the costs as “unallowable” on its own books, and readily acknowledges in written correspondence with the audit team that all of the costs are ineligible for reimbursement under 2 CFR § 230. Expenses that a generous mind might consider ‘ordinary and necessary’ business expenses (that are nevertheless unlawful for the Government to reimburse) such as late charges on vendor invoice payments are a small fraction (<5%) of the total fee expenditures. The vast majority of the expenses are either outright illegal by statute (e.g. lobbying) or unlawful ‘luxury’ expenditures (e.g. alcohol, parties, travel in excess of per diem).

Nevertheless, NEON requests and receives payment from the NSF for 100% of these costs. NEON charges these expenses to NSF Grant 990-9. Upon review, we determine that Grant 990-9 does not in fact exist; it is a fictitious routing mechanism that the NSF built into its “ACMS” cash disbursement system. We find that when NEON charges an amount to Grant 990-9, NSF’s billing system allocates the costs to NEON’s management fee(s) and reimburses the cost, even if the costs themselves are expressly unallowable. Thus, Grant 990-9 is the mechanism by which NEON receives reimbursement for expressly unallowable costs in the guise of a “fee”.

Unlike for-profit fees, which come in ‘chunks’ when authorized by the contracting officer (or other Government officials, we find that this management fee is only requested from NSF when an actual expenditure by NEON has been made or is anticipated. For example, a for-profit company designing and manufacturing a new fighter plane may be entitled to 15% of its total fee/profit when its prototype plane is accepted by the Government. The Government contracting officer would issue an authorization stating that the contractor was entitled to 15% of the fee once the prototype was accepted, and the contractor would immediately bill the Government for the fee amount. Profit is not audited by the Government (although profit may be audited at the proposal stage for compliance and reasonableness); rather, auditors only confirm that the contractor received the amount of profit to which it was entitled. Auditors do not, after the fact, normally question the propriety of awarding the profit in the first place.

This methodology is clearly distinguishable from the methodology a contractor uses to receive payment for allowable costs under a cost-type contract. Allowable costs are billed as incurred and do not usually require contracting officer authorization. Using the example above, to bill for the purchase of steel for the aircraft the contractor would first have to incur the cost (i.e. by purchasing the steel). The contractor would then have to have either paid the vendor for the steel, or intend to pay the vendor in the normal course of
business (usually within 30 days of billing the Government). Once both of those things were accomplished, the contractor would bill the Government for the amount of cost for the steel plus any applicable indirect costs (overhead, G&A, etc.) at rates previously agreed to by the Government. The Government would pay that amount. At the end of the year, the contractor would adjust the indirect rates to its actual rates and true-up its billings with the Government to adjust for any differences between the rates billed, and the actual rates at year-end. The direct costs (the steel itself) and the indirect costs would then be subject to audit and might be adjusted by the Government based on the results of the same. Auditors are free to question any direct or indirect expense if it is not allowable, allocable, and reasonable; and the contracting officer may demand that the contractor repay the Government for any questioned costs (subject to appeal and judicial review).

NEON's methodology for claiming allowable costs is substantively identical to the methods used by for-profits. The only substantive difference is that NEON is authorized to receive its allowable costs as an advance, rather than a reimbursement. This means that NEON receives cash to pay its expenses before it actually pays them – an important consideration since NEON (as a 100% Government funded entity) has no working capital to pay its bills while waiting for Government reimbursements. It therefore enters allowable costs into the ACM$ system prior to payment being due, receives the funds from the NSF forthwith via electronic funds transfer, and pays the expense using the Government funds. For example, if NEON needs to purchase steel to build its towers it purchases the steel, receives and invoice from the vendor, and enters the invoice cost as a direct cost to the construction grant plus applicable indirect costs and receives cash from the NSF equal to this amount from which it pays the invoice (and the applicable indirect costs). Again, this is substantively identical to the way that a for-profit bills to and receives payment from the Government.

However, critically, NEON's methodology for billing its fee is nothing like the way in which a for-profit contractor bills profit/fee, and is exactly like the way that a for-profit contractor bills cost. NEON receives access to the entire amount of its fee at the beginning of each fiscal year. It does not require grants officer authorization for any fee expenditures. NEON does not request fee until it has incurred a specific (unallowable) cost. For example, if NEON holds a happy hour for its employees (which it did, repeatedly) and incurs unallowable costs for alcohol on its corporate credit card, it bills that cost through ACM$ in exactly the same way as it would an allowable cost in the example above and pays off the credit card using the Government funds received from the NSF. The only difference between the methodology by which NEON bills fee, and the methodology by which it bills allowable costs, is that the latter is always billed to Grant 990-9 (which tells the ACM$ to ‘bill’ the management fee) while the former is billed to the applicable grant(s) directly.

Therefore, it is unequivocally clear that the management fee is nothing more than a sham mechanism by which NEON receives payment for unallowable costs. The process outlined above is clearly intended to be, and is in fact, an evasion of the rule and law governing the allowability of costs. Normally, allowable costs are those that the Government will pay, and unallowable costs are those that it will not. As far as NEON and the NSF are concerned, there are no such things as “unallowable costs” because all costs are allowable for NEON – it simply has to bill any unallowable costs to the fictitious Grant 990-9 fee to receive payment, rather than billing directly to its grants. Regardless of whether an expense is charged directly to grants as
cost, or through the fictitious Grant 990-9 as fee, NEON substantively receives payment from the Government for 100% of its expenses as they are incurred and regardless of their allowability.

This cannot be lawful.

To accept otherwise renders the cost allowability provisions of 2 CFR § 230 (and, now, 2 CFR § 200) utterly meaningless.

Note: between 2008 and mid-2014, NEON received reimbursement or advances for $1.8 million of expressly unallowable costs through the Grant 990-9 mechanism.

We conclude that the Grant 990-9 “management fee” process is simply a sham mechanism by which NSF knowingly permits NEON to receive reimbursement for expressly unallowable costs.

Further, even if the management fee is a legitimate mechanism, we find that the Government receives no benefit from NEON’s expenditures for lobbying, parties, alcohol, and the like; therefore, we find that NSF did not properly protect the interest of the taxpayer when it awarded the management fee that it knew, or should have known, would be spent on these costs and instead wasted those funds. Likewise, NEON wasted taxpayer money when it incurred and billed the Government for these unnecessary costs of no substantive benefit to the Government.

Finally, even if the management fee is legitimate and the NSF acted properly, the Byrd Anti-Lobbing Amendment (31 U.S.C. § 1352) prohibits the use of “funds” appropriated under any act of Congress on most types of lobbying. NEON readily concedes that what it booked as “unallowable lobbying” fits within the definition of lobbying in the Byrd Amendment. Since 100% of NEON’s funding (and the NSF’s funding for that matter) comes from money appropriated by the Congress, there is no doubt that NEON’s use of its fee to pay for such lobbying was unlawful.

The defense offered by NEON and the NSF that all profit and fees come from “nonappropriated” funds according to Office of Management & Budget (“OMB”) decree is not persuasive because the question of whether funds are appropriated or nonappropriated is a question of fact – and that fact is determined by whether or not Congress actually appropriated those particular funds. Because all NSF funding is appropriated the fee must necessarily have been paid with appropriated funds. Therefore, the funds NEON used to pay its registered lobbyists were undoubtedly appropriated funds. As such, NEON and the NSF (which knew or should have known of NEON’s expenditures of the funds on lobbying) unquestionably violated the Byrd Amendment.

The team also looks into NEON’s methodology for calculating its contingency reserve. We conclude that NEON utilized a methodology provided by the NSF that is not consistent with broadly accepted capital budgeting methodologies. As a Certified Management Accountant myself, I am a credentialed expert in

1 See, e.g. testimony of NSF Chief Operating Office Dr. Richard Buckius – House Committee on Science Space and Technology, Subcommittee on Oversight and Subcommittee on Research and Technology Joint Hearing – 3 February 2015.

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capital budgeting methodologies, and I was unable to reconcile NEON’s methodology (insofar as NEON even had a methodology) with the requirements of 2 CFR § 230 or any generally accepted methodology for calculating and managing contingency reserves. We therefore find NEON’s capital budgeting methodology for its contingency reserves is not compliant with rule and law.

These findings undergo review by Supervisory Auditor Quant, FAO Manager Jones, and FAO Assistant for Quality Vaill. Revisions are made, and draft findings are substantively approved by all parties. FAO Manager Jones approves the draft findings as the ‘engagement partner’ (i.e. the auditor who actually signs the audit report).

29 April 2013: At the direction of Mr. Quant and Mr. Jones, I prepare a Weekly Significant Activity Report on the NEON management fees for Central Region management. That report states:

During DCAA Assignment #03121-2013J17741001 we discovered that the Contractor received a “management fee” from the National Science Foundation (“NSF”) as part of the grants awarded to Contractor by said agency. The Contractor is a nonprofit entity and is not eligible to receive a fee under rule and law. Upon further examination, we determined that the Contractor is 100% funded by the government. After its first year of operations in FY 2008, the Contractor had unallowable costs that were (obviously) not reimbursed by the government. The Contractor subsequently requested reimbursement of those costs in the form of a “management fee”, and notified the NSF that the purpose of the “fee” was to cover its unallowable costs. The Contractor even provided NSF with a breakdown of the unallowable costs it wished to be reimbursed. NSF granted the fee for ½ percent of the contract value adjusted each year. The Contractor incurred $888,028.28 of “fee” to date. Specifically, in FY 2013 to date (Contractor is on the Federal FY) the Contractor has accumulated $128,359.16 – including nearly $25,000 for a Christmas party, $11,000 for coffee services and $112,000 for lobbying. The Contractor draws on the “fee” the same as it draws on its allowable costs and submits reports to the NSF supporting the costs – again, as if the costs were allowable. Unlike a commercial enterprise, the Contractor is a nonprofit entity and cannot legally receive profit (read “fee”); as such, there is no substantive difference between the “management fee” and a direct reimbursement of the unallowable costs by the NSF. Again, the Contractor’s method of accumulating and billing the “fee” is identical to its method of accumulating and billing its allowable costs. Furthermore, the Contractor states in its policies and procedures that the purpose of the “fee” is to cover its unallowable costs. Finally, as noted above, when the Contractor originally proposed the “fee”, it stated to NSF that the purpose of the fee was to pay its unallowable costs – making that agency unquestionably aware of the true purpose of the so-called “fee”.

To summarize – the Contractor has, with full knowledge and indeed the collusion of National Science Foundation management, unlawfully evaded the allowability limitations of rule and law (specifically 2 CFR §215 and 2 CFR §230), and has received direct reimbursement of its unallowable costs by that agency. The only difference between the facts at hand and a clearly fraudulent reimbursement of unallowable costs is that the NSF
calls the payments a “fee” rather than a “reimbursement” – that is to say, there is no difference at all.

In accordance with the above, we are preparing to issue a fraud referral of both the Contractor, and National Science Foundation management to the Office of the Inspector General of the National Science Foundation as the facts suggest that the Contractor and the NSF have conspired to defraud the United States Federal Government under the False Claims Act (31 U.S.C. §§3729–3733) and other applicable law. Therefore, we wished to notify you of the developing situation.

**17 May 2013:** After review of our findings, I confirm that the actions of the NSF and NEON could indeed be fraudulent with sufficient certainty as to require reporting to the appropriate authority. Specifically, a reasonable person could conclude that the NSF and NEON colluded to evade the restrictions on the payment of the costs in question by creating the sham Grant 990-9 management fee mechanism. If true, this could constitute, amongst other things, conspiracy to defraud the United States 18 U.S.C. §§ 286 & 371, and major fraud against the United States 18 U.S.C. § 1031.

5 CFR § 2635.101(b)(11) requires that Federal employees report fraud to the appropriate authority. Therefore, I issued a preliminary fraud referral to the NSF-IG, thereby reporting the potential fraud to the appropriate authority – the NSF-IG being the designated Executive Branch oversight authority for the NSF.

Note: the issuance of the referral to the NSF-IG under my signature officially begins my status as a whistleblower as defined under the Whistleblower Protection Act because that was the date in which I disclosed what I reasonably believed evidenced “gross mismanagement, a gross waste of funds, an abuse of authority” and “violation[s] of any law, rule, or regulation” to an ‘appropriate authority’ (in this case also outside of my own chain of command).

**23 May 2013:** Telecon between officials at DCAA and NSF-IG regarding the fraud referral. I led the meeting.

Senior attendees from NSF-IG include Inspector General Alison Lerner, her deputy, two of her assistant IGs (audit and legal), special agents representing the third assistant IG (investigations), and numerous other management and staff officials from all over the country.

Senior officials from DCAA include Central Region Director Tim Carr, Regional Audit Manager Jerry McAfee, and FAO Manager Allen Jones.

The NSF-IG concurs with approved draft findings and notes it had not previously considered the “management fee” issue in the context of the fraudulent evasion of the cost allowability provisions of 2 CFR § 230.

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We note that DCAA cannot make a determination of fraud because it lacks criminal investigation authority. As such, the IG agrees that it is responsible for handling investigating the allegations of fraud based on the referral.

However, IG Lerner does request that DCAA Legal review the “management fee” issue for compliance with 2 CFR § 230 as a separate issue from the allegations of fraud. Central Region Regional Director Carr agrees to provide a written opinion from DCAA’s Office of the General Counsel no later than 31 May 2013.

Note: the requested legal review was never provided to NSF-IG. A document purporting to be that review, but instead unlawfully making a determination that no fraud had occurred at NEON was issued to the NSF-IG in early 2014, nine months after the 2 CFR § 230 opinion was promised to the IG.

In 2014 the NSF-IG ultimately rejected DCAA’s attempt to undermine the referral, substantiates some or all of the allegations of fraud, and refers the matter to the U.S. Attorney for prosecution. DOJ declined to prosecute the matter, pending Congressional action.

As of 11 March 2015, the NSF-IG is again investigating the matter as further facts have come to light.

24 May 2013: The DBO audit team (Mr. Jones, Mr. Quant, Ms. Vaill, and I) draft a ‘final’ Statement of Conditions and Recommendations (“SOCAR”) summarizing the draft audit findings with updates from the telecon.

The SOCAR contains eight findings, two of which are the management fee and contingency reserve issues. After extensive discussions within the team, revisions are made and the SOCAR is approved by Mr. Quant as my 1st level supervisor, and Mr. Jones as my second level supervisor.

The SOCAR is sent to Regional Audit Manager Jerry McAfee (the 3rd level supervisor) for final approval.

28 May 2013: Mr. McAfee objects to the SOCARs. Specifically, he states that NSF guidance permits NEON to receive a management fee and that our questioning of that “fee” is, therefore, improper.

30 May 2013: In response to Mr. McAfee’s objection, I state in an email (to Mr. Quant):

You asked me to provide a brief summary of my thoughts regarding the RAM’s concern that NSF policy allows for the payments of “fees”, yet we state that fees are not permitted in the relevant SOCAR.

Two points come to mind.

First, NSF can do business with for-profit contractors. As such, it makes sense that they would have a fee mechanism in place to pay some/all of these contractors a traditional fixed or award fee (NSF defines a “fee” as “profit” in its Grant Policy Manual). However, NEON
is a non-profit entity that cannot lawfully make and retain a “profit” traditional sense to use for anything other than its operating expenses in the per 26 CFR §1.501(3)(C)-1.

Second, the entire point of the fraud referral is that we think that NSF’s policy of providing a “fee” to a non-profit entity in the manner we discuss in said referral is illegal under higher law (specifically 2 CFR §215 and 2 CFR §230) than NSF policy. Additionally, the fact that NSF’s policies allow for such a “fee” is not a defense against the SOCAR, it is proof that the NSF itself is complicit in the alleged fraud – as we state in the referral.

At the request of the RAM, I also provide the working papers supporting the SOCAR via email.

**Later on 30 May 2013:** I notify United States Senator Tom Coburn (R-OK) via my official DCAA email of the allegations of fraud associated with NEON and provide his office with a copy of the referral. I inform Mr. Jones verbally that I have done so in accordance with the provisions of the Whistleblower Protection Act and 5 U.S.C. § 7211.

Note: On this date I not only make a protected whistleblower disclosure to another appropriate authority, but also provide a member of Congress with information in accordance with 5 U.S.C. § 7211. Further, notifying Mr. Jones of my protected disclosure in his capacity as a management official gives DCAA actual and constructive notice of my status as a whistleblower.

**3 June 2013:** I am assigned to lead an audit of the disclosure statement of the Colorado School of Mines under DCAA Assignment No. 03121-2013J19100003.

**4 June 2013:** I confirm via email with Mr. Willems that the NSF-IG has not received the DCAA legal opinion, and stated to Mr. Willems that DCAA’s Office of the General Counsel has made no attempt to contact me or anyone at the Denver Branch Office to discuss the matter, and expressed my concern that DCAA GC seemed to be proceeding without the input of the local attestation team at the DBO.

**7 June 2013:** NEON Director of Finance Dana White confirms in writing via email that NEON has a lobbying contract with Oldaker Group, LLC. 100% of that contract is paid with Government funds (via the management fee) from NEON’s NSF grants.

**11 June 2013:** DCAA Mid-Atlantic Region requests via email a meeting with DCAA offices conducting audits of the following NSF grantees: CAL Tech, AURA, NEON, Univ. of Wisconsin, COL, and AUI. The purpose of the meeting was to discuss the contingency reserve issue.

**12 June 2013:** Regional Audit Manager Jerry McAfee orders the DBO team not to participate in the requested telecon; Mr. Quant passes the order on to me in an email.

Note: This order by Mr. McAfee not to participate in a meeting called by the NSF-IG clearly constitutes unlawful interference with an inspector general as prohibited by 5 U.S.C. Appendix § 8(G). If the NSF-IG...
requests a meeting related to an audit or investigation under its jurisdiction, we are bound by law to cooperate.

It also violates GAGAS insofar as it is an Agency management-imposed restriction on the ability of the attestation team to communicate with the client.

NSF-IG audit manager Mr. David Willems contacts Mr. Jones, Mr. Quant and I directly via email (after Mr. McAfee’s order is communicated to me by Mr. Quant) to reiterate his request for a meeting. Per the instructions of Mr. Quant, I do not respond to Mr. Willems’s email.

Note: Again, the order from Mr. McAfee not to correspond or cooperate with the NSF-IG request is unequivocally unlawful interference with an inspector general. To not even respond to the email is also unprofessional conduct of the highest order.

13 June 2013: Central Region Deputy Regional Director Martha McKune speaks at the Denver DCAA staff conference. During that meeting in front of three field audit offices (Denver, Rocky Mountain, and Central Region Virtual Incurred Cost. No. 3), Ms. McKune states that DCAA personnel are explicitly forbidden from reporting fraud in our audit reports or supporting working papers. Indeed, Ms. McKune states that auditors are forbidden from even using the work “fraud” anywhere in the audit report or working paper package.

Note: Ms. McKune’s statements are a direct violation of rule and law. For example, her statements violate 5 CFR § 2635.101(b)(11) – which requires executive branch employees to report “fraud” to the “appropriate authority”; The Inspector General Act – which forbids interference with an inspector general (5 U.S.C. Appendix § 8(G)), (forbidding fraud reporting in our reports and working papers clearly interferes with the inspectors general, who are charged with investigating fraud); and GAGAS § 5.24 which states:

> When performing a GAGAS examination engagement, and auditors conclude, based on sufficient, appropriate evidence, that any of the following either has occurred or is likely to have occurred, they should include in their examination report the relevant information about

> a. fraud and noncompliance with provisions of laws or regulations that have a material effect on the subject matter or an assertion about the subject matter and any other instances that warrant the attention of those charged with governance …

(emphasis added)

DBO FAQ Ms. Angie Vaill later stated that she believed Ms. McKune’s statements about fraud to be completely false and in violation of GAGAS and the Contract Audit Manual.
When I and others challenge Ms. McKune’s clearly unlawful statements during her presentation, she states that any DCAA employee who uses the word “fraud” in and audit or any working papers will be disciplined.

When I ask Ms. McKune about her position again and cited GAGAS § 5.24 during a break in the conference, Ms. McKune states that she has “heard about you [me]” from Mr. McAfee and further states that if I “want to continue your career with this Agency” that I will “learn to be a team player”, or suffer “disciplinary action” for “insubordination”.

I considered (and am certain with the benefit of hindsight) Ms. McKune’s statements to be a threat of retaliation and reprisal for my protected whistleblower disclosures – to wit, reporting the allegations of fraud and noncompliance related to NEON in both the referral to the NSF-IG and the reporting of the noncompliance in the draft SOCAR. Mr. Jones and a number of other DCAA employees witnessed Ms. McKune’s statements.

14 June 2013: Meeting with Mr. McAfee, Mr. Jones, Mr. Quant and I in regards to the engagement. Mr. McAfee states that he does not agree with any of the SOCARs. He articulates a number of vague concerns. After the meeting Mr. Jones states that he does not agree with any of Mr. McAfee’s comments and concerns, but nevertheless requests that I revised the SOCAR to maintain our position whilst addressing Mr. McAfee’s comments and concerns whenever possible. I agree to do so.

Note: During the meeting Mr. McAfee acted in an unprofessional and aggressive fashion unbecoming of a Government employee generally, and a member of management granted supervisory authority specifically. During the meeting he repeatedly raised his voice to the point that it was objectively ‘yelling’ or even ‘screaming’ directly at me. This provoked a defensive response from me in which my own voice was at times raised.

Following the meeting Mr. Jones stated to me that Mr. McAfee’s behavior was “inappropriate” and “unprofessional” and praised my restraint when dealing with the situation. He also called Mr. McAfee’s substantive arguments “nonsensical”.

17 – 18 June 2013: I revised the SOCAR and provide those revisions to Mr. Jones and Mr. Quant for review. After further discussion of said revisions, I prepare and submit a second revision for review.

24 June 2013: I report Ms. McKune’s statements via a submission to the DCAA Suggestion Program and an email to DCAA Director Patrick Fitzgerald.

I state in the suggestion submission that DCAA’s policy, as articulated by Ms. McKune, clearly violates GAGAS and must be corrected forthwith. DCAA Headquarters (Mr. Scott Compton) takes no action to correct the issue.

In the email to Director Fitzgerald I provide the suggestion program submission and state that “As this issue calls into question DCAA’s fundamental compliance with GAGAS on a number of engagements...
(including a major engagement upon which I am currently assigned as lead auditor), and would thus require
direct reporting by me to the DoD-IG and the GAO/Congress if the issue is not adequately addressed in a
timely fashion, I strongly suggest that this issue be reviewed forthwith.”

25 June 2013: I export the NEON working paper package to Mr. Quant for review of the revisions made in
response to Mr. McAfee’s comments.

26 June 2013 – 18 July 2013: Central Region management takes no action related to NEON, forcing the
DBO to request repeated due date extensions from NSF-IG for the audit report.

19 July 2013: NEON CFO Mr. Tom Sheldon requests the status of the NEON draft audit report in an
email to me, and states that the report is “several months past the target date”. I pass the email on to Mr.
Quant. At Mr. Quant’s verbal instruction, I respond to Mr. Sheldon and state: “Our draft results have been
in management review for some time, and it appears that they will remain in that status for some time.
Once we have approved draft results in hand, we will pass them on to NEON without delay. I do not have
an estimate at this time as to when that will occur.”

19 July 2013 – 30 July 2013: Mr. McAfee declines to approve the SOCAR and orders the removal of all
findings and the issuance of an unqualified audit opinion finding no noncompliances or wrongdoing by
NEON. Mr. McAfee does not provide any written or substantive verbal justification for his decision.

Mr. Jones, Mr. Quant and I do not concur with Mr. McAfee’s decision.

Note: Mr. McAfee’s decision is contrary to rule, law and policy – including GAGAS. It is highly
questionable whether Mr. Jones as ‘engagement partner’ can even be flat-out overruled, but at the very least
Mr. McAfee could not order the opinion to be changed from adverse to unqualified without written
justification. This event represents the ‘official’ beginning of DCAA’s noncompliance with said rule, law
and policy.

FAO Manager Jones appeals the decision to Deputy Regional Director (Central Region) Martha McKune in
accordance with DCAA disagreements resolution process.

Note: this process does not appear to comply with the Code of Professional Conduct of the American
Institute of Certified Public Accountants, which governs all DCAA auditors. Ms. McKune, Mr. McAfee,
Mr. Jones, Mr. Quant and I are all certified public accountants bound either directly via membership in
AICPA or indirectly via state law to follow AICPA’s Code of Conduct – so there is no question that the
Code applies to us.

Specifically, I note that Mr. Jones as the auditor signing the audit report (what the AICPA calls the
“engagement partner” cannot have any true superiors in the sense that he cannot sign the report if he
disagrees with it, and no one can order him to do so. Any review of his work must be performed by a
person of equal rank by auditing standards as doing otherwise results in the subordination of his judgment
at least in appearance. As both Mr. McAfee and Ms. McKune are Mr. Jones’s superiors (and, indeed, the

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entire DBO team’s superiors), there is at least the appearance of impropriety in any actions they take to overrule Mr. Jones on an audit issue because a reasonable person could conclude that either or both Mr. McAfee and Ms. McKune are in a position to improperly coerce Mr. Jones (or the rest of the team) into improper actions related to the audit under threat of personnel action.

Given that later Mr. McAfee (accordingly to Mr. Jones) did in fact order downgrades of the performance evaluations of Mr. Quant, Ms. Vaill, & I and also personally downgraded Mr. Jones on his performance evaluation for refusing to withdraw his objection to being overruled on the audit – it appears that impropriety actually occurred.

I objected based on the reasoning above to Mr. McAfee and Ms. McKune having decision-making authority over Mr. Jones. My objection is ignored by Ms. McKune and Mr. McAfee. Instead, Ms. McKune continues to be the designated appeals official for audit disagreements in the Central Region.

Note: the reasoning behind the AICPA’s position is made clear by the events that will follow in this case. As articulated hereafter, Mr. McAfee, Ms. McKune and other senior officials at DCAA first attempt to coerce Mr. Jones, Mr. Quant, and myself to back off the NEON findings and, when we refuse to do so, they simply order the findings removed and then take prohibited personnel actions against at least Mr. Jones and myself as a result of our actions – including, specifically, my protected whistleblower disclosures related to the matter.

Mr. McAfee, Ms. McKune, and the other senior officials would not be in a position to take these actions were they not superior to Mr. Jones (the “engagement partner” in AICPA parlance).

Again, Mr. Jones as the auditor signing the report must be independent of everyone else within DCAA, and free to come to use his own professional judgment without interference. Regardless of who was ultimately right or wrong on the substantive issues, forcing Mr. Jones to sign an audit report that does not contain substantiated & material findings that Mr. Jones believes (and states in writing in the working papers that he believes) should have been included improperly subordinates his judgment and results in him signing an audit report that he believes is false and/or misleading in direct violation of the Code and GAGAS.

As the fundamental noncompliance of DCAA’s disagreements policy with the Code is of critical importance, I will provide further substantive support for my position on the matter here. Note that in the discussion below I have used the Code as it existed in January 2014 while these issues were ongoing.

DCAA DISAGREEMENTS POLICY
The DCAA disagreements policy is very simple. In the event of a conflict between an auditor and a supervisor, the FAO Manager can overrule one or the other. The ‘loser’ documents his or her disagreement in the working papers. The same idea goes for a disagreement between the auditor/supervisor and the FAO Manager with the RAM overruling. Disagreements between the auditor/supervisor/manager are broken by the DRD, who is the final authority on the matter. Regardless of the outcome of the disagreements process, the FAO Manager is required to sign the final audit report, even if (as occurred here) the FAO Manager
believes that the final report is false and/or misleading. The Code (cited as “ET”) is clearly irreconcilable with this policy:

ET § 102.02 *Knowing misrepresentations* ...

A member shall be considered to have knowingly misrepresented facts in violation of rule 102 [ET section 102.01] when he or she knowingly—

[...]

c. *Signs, or permits or directs another to sign, a document containing materially false and misleading information.*

ET § 102.05 *Subordination of Judgment*

Rule 102 prohibits a member from knowingly misrepresenting facts or subordinating his or her judgment when performing professional services for a client, for an employer, or on a volunteer basis. Although Rule 102 prohibits subordination of judgment to a client, this interpretation addresses differences of opinion between a member and his or her supervisor or any other person within the member’s organization.

If a member and his or her supervisor or any other person within the member’s organization have a difference of opinion relating to the application of accounting principles; *auditing standards*; or other relevant professional standards, including standards applicable to tax and consulting services or applicable laws or regulations, then self-interest, familiarity, and undue influence threats to the member’s compliance with Rule 102 may exist. Accordingly, the member should apply appropriate safeguards so that the member does not subordinate his or her judgment when the member concludes the difference of opinion creates significant threats to the member’s integrity and objectivity.

In assessing the significance of any identified threats, the member should form a conclusion, after appropriate research or consultation, about whether the result of the position taken by the supervisor or other person

a. fails to comply with professional standards, when applicable;

b. creates a material misrepresentation of fact; or
c. may violate applicable laws or regulations.

...

If the member concludes that the position results in a material misrepresentation of fact or a violation of applicable laws or regulations, then threats would be considered significant. In such circumstances, the member should discuss his or her concerns with the supervisor. If the difference of opinion is still not resolved, then the member should discuss his or her concerns with the appropriate higher level(s) of management within the member's organization (for example, the supervisor's immediate superior, senior management, and those charged with governance).

If after discussing such concerns with the supervisor and appropriate higher level(s) of management within the member's organization, the member concludes that appropriate action was not taken, then the member should consider, in no specific order, the following safeguards to ensure that threats to the member's compliance with Rule 102 are eliminated or reduced to an acceptable level:

...

- Determining whether any responsibilities exist to communicate to third parties, such as regulatory authorities […]
- Consulting with his or her legal counsel regarding his or her responsibilities.
- Documenting his or her understanding of the facts, the accounting principles, auditing standards, or other relevant professional standards involved or applicable laws or regulations and the conversations and parties with whom these matters were discussed.

If the member concludes that no safeguards can eliminate or reduce the threats to an acceptable level or if the member concludes that appropriate action was not taken, then he or she should consider his or her continuing relationship with the member's organization and take appropriate steps to eliminate his or her exposure to subordination of judgment.

Nothing in this interpretation would preclude a member from resigning from the member's organization at any time. However, resignation may not relieve the member of his or her responsibilities in the situation, including any responsibility to disclose to third parties, such as regulatory authorities …

A member should use professional judgment and apply similar safeguards, as appropriate, to other situations involving a difference of opinion so that the member does not subordinate his or her judgment.

(emphasis added – Code as it existed at the time of the alleged offenses)
Again, the DCAA disagreements policy as applied to the NEON and CSM engagements requires the ‘losing’ side to document his/her/their disagreement with the ‘winning’ side, but nevertheless requires the FAO Manager to sign the report, even if he or she believes that the report that he or she is signing is false and misleading.

This is fundamentally inconsistent with the AICPA Code of Ethics insofar as an auditor (including that FAO Manager) must determine, based solely upon his or her independent professional judgment, what safeguards should be implemented, and whether they are sufficient. If an auditor believes that the engagement documentation contains materially false or misleading information, then her or she must: 1) not sign any documents within the engagement that contain such false and misleading information including, but not limited to, working papers and the engagement report; 2) implement safeguards including, but not limited to, documenting the disagreement, following internal guidance, and communicating with responsible third parties (e.g. Congress, inspectors general, etc.); 3) determine if the safeguards reduce the threats to the auditor’s independent judgment to an acceptable level; 4) if not, take appropriate action to eliminate the subordination of judgment – including, but not limited to, resigning from the engagement and, if needed, the audit entity.

Therefore, the DCAA disagreements policy as applied to the NEON and CSM engagement does not comply with the AICPA Code of Professional Conduct, and DCAA personnel that follow the disagreements policy but not the Code are not performing in accordance with AICPA Standards and, thus, with GAGAS. Or to put it more simply, the DCAA disagreements policy does not comply with GAGAS.

This situation is frightfully similar to that at Arthur Andersen where senior management subordinated or overruled engagement partners and ordered substantiated findings omitted or removed from audit reports. This was later determined to be fraudulent, particularly as related to the Enron financial audits.

At bottom: DCAA’s administrative structure that places management officials with audit authority as the direct superiors of the auditor who signs the report (i.e. the “engagement partner” equivalent) and its disagreements policy that permits those superiors to actually order findings to be added or removed from audit reports, and finally its delegation of authority which grants performance evaluation and other personnel authority to those same officials clearly violates the Code and, through it, GAGAS – and calls into question every single audit this Agency has ever performed on which there was an unresolved disagreement between an FAO Manager as engagement partner and any of his or her superiors but the FAO Manager was nevertheless required to sign the report with which he or she disagreed.

31 July 2013:
Mr. McAfee finally provides Mr. Jones with written comments regarding the draft SOCAR effectively arguing that all of the SOCARs are invalid. At Mr. Jones’s direction, I make revisions based on those of Mr. McAfee’s comments with which I agree, and provide counter-arguments to those of Mr. McAfee’s comments with which I do not agree. I provide those revisions and counter-arguments by email to Mr. Jones and Mr. Quant.
Mr. Jones forwards the document on to Central Region Special Program chief Mr. Gordon Eeten per Mr. McAfee’s instructions and states: “The attached SOCARs are for your review and discussion next week when we meet to resolve the differences of opinions between the FAO and the RAM.” The referenced “discussion” is a meeting with Ms. McKune to officially resolve the disagreement between Mr. Jones as engagement partner and Mr. McAfee as RAM.

7 August 2013: A teleconference between Ms. McKune, Mr. McAfee, and the Denver Branch Office is conducted. I minute the telecon for the record.

Ms. McKune states that she agrees with Mr. McAfee’s position entirely. She does not permit the Denver Branch Office to provide any counterarguments or rebuttal.

However, she also declines to make an ‘official final decision’ and instead refers the matter to the Mid-Atlantic Region for a “technical” review and opinion on the correctness of the Denver Branch Office’s findings.

Note: This is contrary to the established disagreements policy (flawed though it may be) that requires Ms. McKune to make a decision, not defer that decision to an entirely different region. By doing so, she simply transfers the subordination of judgement problem to someone else. Ultimately, Mr. Jones (as “engagement partner”) still signed a report that he asserted in writing he believed was false and misleading. Exactly who ordered Mr. Jones to sign a false report is irrelevant under the Code. However, it is nevertheless worthy of note that DCAA policy was not followed.

Ms. McKune also orders all Denver Branch Office auditors to take remedial training in conducting nonprofit audits, stating that they are not professionally competent to even conduct the engagement. She does not provide any evidence to support this assertion. I point out that I had in fact taken an upper-division undergraduate course devoted solely to governmental and nonprofit accounting, am a Certified Public Accountant, and am a Director and the Treasurer (and designated finance/accounting expert) of a major Colorado nonprofit – and that I am therefore eminently qualified to undertake an audit of a nonprofit organization. Ms. McKune and Mr. McAfee did not respond to this statement, but maintain that the local auditors at the Denver Branch Office were incompetent.

Ms. McKune and Mr. McAfee also call into question the independence of the Denver Branch Office team. Specifically, they accused the DBO of not being independent of the NSF-IG. I note that the DBO had specifically addressed this issue in a working paper early in the audit, and put in place adequate safeguards to protect against even the appearance of a lack of independence. Mr. Jones notes that he found the safeguards more than adequate to protect our independence.

Note: These attacks on the professional competence and integrity of the DBO team in general, and me specifically, is indicative of Agency management’s actions on both sets of engagements; to wit, making unsupported *ad hominem* attacks on the local team instead of substantive arguments against the team’s positions.

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Ms. McKune admits she had never read the working paper in question; indeed, Ms. McKune states she had not examined at any of the working papers (including the SOCAR) but relied entirely on Mr. McAfee’s description of them and a ‘brief glance’ at the SOCAR. Ms. McKune states that she did not have the time nor the intention of reviewing the working papers (including the SOCAR beyond a glance).

Note: Ms. McKune’s admission is a serious violation of GAGAS and DCAA policy – as the deciding official between the DBO and the RAM, Ms. McKune’s reliance on the RAM’s description of the DBO’s position and the working papers, without making any attempt to review any of the source documentation herself was grossly improper, and represents a clear conflict of interest.

Nevertheless, she states that certain documentation (such as vouchers showing charges to Grant 990-9 by NEON) should have been included in the working papers (apparently based on statements by Mr. McAfee that they were not). When we point out that the requested documentation was in fact included in the working papers, both Ms. McKune and Mr. McAfee state that we are incorrect, and that the omission casts serious doubt on our competence.

Ms. McKune further states that any audit results that in any way “implicated the National Science Foundation” were “unacceptable”. She also states (paraphrasing) ‘if anyone thinks that we are auditing the NSF, then they are not independent, and there will be disciplinary action’. I took that as a direct threat that if any further discussion of possible fraud by NSF was mentioned, or any further action was taken on the matter, Ms. McKune would impose disciplinary action against the person or persons discussing the issue.

Note: I completed and signed a statement documenting the information above immediately after the conversation for the record, and placed it in the working paper package. I specifically stated therein that I considered Ms. McKune’s statement as a threat of reprisal for pursuing the referral. Therefore, it is virtually guaranteed that at least Ms. McKune was aware of the allegation given that she claimed to have reviewed the working paper package at least later in 2014.

Again, this series of events during the telecon ‘officially’ begins DCAA management’s false accusations that the Denver Branch Office audit team including – very specifically – myself, were neither sufficiently competent nor sufficiently independent to conduct this engagement. Such allegations, if true, would represent serious misconduct on our part that could, and should, result in termination and criminal prosecution. At the very least, I should have been immediately removed from the engagement if Mr. McAfee or Ms. McKune actually believed the accusations they were making. The fact that they did not order me to be removed is telling.

Indeed, the fact that no such action was taken, that the accusations continued through the final DCAA management decision in mid-2014, that the accusations were never rescinded, and that no documentation generated explaining what the Agency did to address such serious allegations – I must conclude that the allegations were patently false.

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Therefore, making those allegations against the DBO team (including myself) without any reasonable basis for doing, apparently in an attempt to coerce us to remove the findings and agree with Ms. McKune and Mr. McAfee, could reasonably represent false statements (18 U.S.C. § 1001), obstruction of proceedings (18 U.S.C. § 1505), witness tampering (18 U.S.C. § 1512(b), (c) and (d)) and obstruction of a Federal Auditor (18 U.S.C. § 1516) by one or both of them.

Furthermore, insofar as such false allegations could jeopardize our employment with DCAA specifically and the Federal Government generally, they also likely constitute retaliation against a witness or informant (18 U.S.C. 1513(e)) by Ms. McKune and Mr. McAfee.

As such, it appears that at this point Ms. McKune and Mr. McAfee committed criminal misconduct in an attempt to unlawfully coerce the Denver Branch Office into removing the substantiated findings of fraud and noncompliance from the SOCAR, audit report, and working papers. Their course of conduct in future takes what might otherwise be written off as an isolated incident or misunderstanding, and instead makes it clear that intimidation, retaliation, coercion, and reprisal was their intent from day one.

Ms. McKune improperly dispatching the entire audit to the Mid-Atlantic Region for a “technical review” could then reasonably be interpreted as giving the DBO team time to ‘think about’ the threats and, presumably, back down.

When this did not work, Mr. Jones and myself were ‘punished’ with negative performance evaluations. Indeed, Mr. Quant (presumably under pressure from Mr. McAfee and management) stated in my 2013/14 performance evaluation (dated 25 July 2014) made a number of outrageous and patently false statements related to my work on the NEON and CSM engagements in justifying the downgrade.

For example he stated “He continues to make negative comments about DCAA which have an adverse impact on the team”, apparently referring to my statements that the Agency’s actions appeared to be unlawful. He also stated “He does not always act in a professional manner with other DCAA staff, particularly those at the regional office”, despite the fact that (as numerous witnesses can attest) it was in fact Mr. McAfee and Ms. McKune that acted unprofessionally towards me! Mr. Quant also made numerous references to my performing ‘unnecessary work and not meeting deadlines – apparently referencing my refusal to obey DCAA management’s unlawful orders to remove the substantiated audit findings from the working papers and report.

While I have not seen Mr. Jones’s performance evaluation, he has stated to me that he was also downgraded based on his actions related to NEON. Mr. Jones stated that he had complained to DCAA-IG regarding the downgrade.

If true, these downgrades clearly represent prohibited personnel practices under the Whistleblower Protection Act.

However, this document (Working Papers 07i and 07i-01) was removed from the final archived working paper package. As will be discussed later in this document, numerous other critical working
papers were deleted (not superseded and maintained for the record) from the final package. The absence is clearly visible because the 07 working paper series skips from 07g to 07j (skipping the 07h series, which will be discussed later, and the 07i series, at issue here).

(Note: I will discuss the other documents deleted when I reach their creation point chronologically; the law cited hereafter applies to those instances as well and I will endeavor to cross reference those instances to this discussion instead of repeating it.)

The final archived package represents the official audit record. If the document was removed deliberately in an attempt to conceal Ms. McKune’s allegedly unlawful actions, such removal likely violates 18 U.S.C. § 1519, which states:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both. (emphasis added)

Indeed, 18 U.S.C. § 1519 was written in response to public accounting firm Arthur Andersen shredding audit working papers related to its audits of Enron. The NEON working paper package only exists digitally. Therefore, deleting this working paper from the package is the digital working paper equivalent of Arthur Andersen’s shredding of the Enron working papers and likely violates 18 U.S.C. § 1519.

Indeed, had I not kept an unofficial backup of the original DBO approved working paper package (dated 4 April 2014), none of the missing documentation would be available, and no concrete evidence of the information contained therein would exist.

Therefore, the final archived audit working paper package in the possession of DCAA is clearly false insofar as critical documents were deleted from the file between the time I submitted the DBO approved package to DCAA management, and the time that management . Those working papers call into question the propriety of NEON’s receipt of Federal funds. The DCAA official(s) who deleted the documents and are now in possession of the final archived working paper package likely violated 18 U.S.C. § 1002 Possession of false papers to defraud United States which states:

> Whoever, knowingly and with intent to defraud the United States, or any agency thereof, possesses any false, altered, forged, or counterfeited writing or document for the purpose of enabling another to obtain from the United States, or from any agency, officer or agent thereof, any sum of money, shall be fined under this title or imprisoned not more than five years, or both. (emphasis added)

insofar as the deletion of the documents from the official record removes the findings calling into question NEON’s receipt of Federal funds for its contingency reserve and management fee and thereby removes that
impediment to its receipt of such funds in future, and therefore could reasonably be said to ‘enable it to obtain a sum of money’ from the United States under fraudulent circumstances.

Performing further investigation to determine whether the decision to delete the documents was prompted by NEON and/or the NSF is likely justified. If NEON and/or the NSF influenced that decision, their actions would likely also violate the law.

It is extremely important to note at this point that the NSF-IG is a criminal law enforcement agency, and that several officials to which information related to the NEON engagement, such as the fraud referral, was communicated, and to which the audit report would be communicated, are law enforcement officers, specifically Federal Special Agents. I also communicated the referral and my concerns related to the DCAA’s conduct to the DoDIG, including Special Agents of the Defense Criminal Investigative Service. Therefore, there is no doubt that our audit report, referral, and most if not all other communication to the NSF-IG and DoDIG constitutes communication/reports to a law enforcement officer, official, agency or department.

Finally, at the very least the failure to retain this document violates the recordkeeping requirements of GAGAS.

8 August 2013 - March 2014: Mid-Atlantic technical review.

Note: Mid-Atlantic consistently failed to communicate with the Denver Branch Office and conducted its review virtually without our input. This was not compliant with the auditing standards governing communication within the attestation team.

Further, the Denver Branch Office was not provided with the opportunity to review the Mid-Atlantic findings and provide rebuttal prior to Ms. McKune’s decision in 2014 detailed below.

Finally, Mid-Atlantic took over 8 months to complete its review. Mid-Atlantic repeatedly and unilaterally extended its agreed due date for its review. Again, the final audit was due to the NSF-IG in June 2013, but the audit was not actually completed and submitted until fall 2014. The Denver Branch Office repeatedly objected to the delay through FAO Manager Jones, but Central Region management declined to address the issue.

9 August 2013: At the request of Mr. Quant and Mr. Jones, I provide copies of the vouchers in the working paper package to them to pass on to Ms. McKune and Mr. McAfee.

Note: This proves that Ms. McKune and Mr. McAfee’s allegations that those vouchers were not in the working paper package were false.

12 August 2013: Mr. McAfee responds via email and states that the vouchers provided are not official government documents.
14 August 2013: The DBO confirms that the vouchers provided are the official vouchers requires by the NSF.

15 August 2013: ONR provides CSM’s negotiated FY 2013 FPRP to us.

20 August 2013: I request via email that NEON Director of Finance Dana White provide screenshots of NSF’s cash advance system (code name: “ACM$”) that confirms that the information provided by NEON and included in the working papers is in fact the official vouchers. Ms. White responds via email and provides the requested documentation, which confirms the DBO’s position. I forward the information to Mr. Jones and Mr. Quant. Mr. Jones forwards the information to Ms. McKune, Mr. Eeten, and Mr. McAfee.

Mr. McAfee orders Mr. Jones to request technical assistance from the NSF-IG related to our finding that NEON exceeded the scope of its mandate related to its use of contingency reserve funds over the DBO’s objection that no such review is proper (for independence reasons) or necessary.

Note: I am still unable to figure out how Central Region management could on one hand accuse me of not being independent from the NSF-IG, and then order me to get the opinion of the NSF-IG on a critical part of the audit and consider that opinion when drawing my conclusions on that issue. Given that the audit team concluded that accepting unverifiable information from the NSF-IG would damage our independence, and implemented safeguards to avoid this occurrence – it makes no sense that we would simply accept the technical opinion of NSF-IG (or NSF for that matter) – especially given Central Region’s (however unjustifiable) concerns.

This supports the supposition that the allegations of a lack of independence are false and designed to coerce me into not pursuing the fraud and noncompliance issues in NEON; otherwise, the Agency should have removed me from the audit – and certainly should not have ordered me to seek the opinion of the very agency with which it was accusing me of colluding.

28 August 2013: Mr. Jones requests technical assistance from NSF-IG via email.

29 August 2013: After discussion with Mr. Quant and Mr. Jones, I write to Mr. Willems in an email and request that NSF-IG proceed on the technical assistance request without involving the NSF, as the involvement of the NSF (which was implicated in the fraud allegations) would likely implicate our independence even more than involving the NSF-IG.

Note: NSF-IG was ultimately unable to provide the technical assistance due to a lack of independent qualified personnel. The NSF-IG informed DCAA management of this fact, but DCAA management insisted that without the technical review, we could not come to a conclusion on the contingency issues. The DBO has taken the position since day one that we were qualified to address this issue in-house. Therefore, it appears that DCAA management’s actions were designed as a ‘self-fulfilling prophecy’ in which our predestined failure to obtain technical assistance would serve as an excuse not to support the DBO’s findings. Creating a scenario in which the audit team was destined to fail does not comply with GAGAS.

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29 August 2013: Entrance conference for CSM FY 2012 fringe rates incurred cost and FY 2014 FPRP scheduled under Assignment Nos. 3121-2012J10100001 and 3121-2013J23000001 respectively. Our point of contact is CSM Controller Mr. Roger Cusworth, CPA.

6 September 2013: CSM entrance conference at CSM’s campus in Golden. Mr. Quant and I attended. We decided to combine the FY 2012 fringe incurred cost examination with the FY 2013 fringe incurred cost for efficiency. Mr. Cusworth agreed to provide the FY 2013 fringe rate incurred cost as soon as possible.

16 September 2013: Mr. Willems writes to the DBO via email r.e. the request for technical assistance. Mr. Willems stated (correctly) that it was his understanding that NEON admitted that most or all of the uses of contingency reserve represented changes in scope. He requested copies of the working papers documenting NEON’s admission.

20 September 2013: The DBO completes the adequacy examination of CSM’s Initial Disclosure Statement, Modification No. 2 and will issue an unqualified report. This examination was limited to a determination of adequacy and did not address compliance.

Mr. Cusworth sends CSM’s Disclosure Statement, Revision No. 1 to ONR. We will audit that disclosure statement for adequacy and compliance. This will be the first examination of CSM’s disclosure statements for compliance since CSM became subject to the Cost Accounting Standards (“CAS”) in 2010. We decide that we will also examine the Initial Disclosure Statement (as of Modification No. 2) for compliance as well. This will increase our efficiency by allowing us to examine those portions of both disclosure statements that are identical (which is the majority of the statements) at once, and then examine the changes between the Initial Disclosure Statement and Revision No. 1 separately.

25 October 2013: Chesapeake Bay Branch Office FAO Manager Walter L. Newell, CPA writes to Mr. Jones via email to discuss the Mid-Atlantic technical review. Mr. Newell is the FAO Manager for Technical Specialist Mr. Tony Baylor, who was assigned to perform the review. Mr. Newell state that Mr. Baylor was furloughed and will get back to work on the review once he returns.

5 November 2013: I write an email directly to DCAA Director Patrick Fitzgerald. I provide an overview of the NEON engagement to date, note the issuance of the fraud referral, and state with concern that DCAA has failed to provide critical compliance information requested by a sitting inspector general in a timely fashion. I further state that I believe this failure to be a critical one that seriously endangers the reputation of this Agency. I further state that it appears that Ms. McKune is actively impeding the audit. I finally state that I rely upon Director Fitzgerald’s judgment to resolve the matter.

Note: As of this date, DCAA Director Fitzgerald was made fully aware that, in my opinion, Ms. McKune was actively obstructing the audit. As Director, Mr. Fitzgerald knew (or should have known) that obstruction of a Federal Audit is a criminal act, and therefore that the allegation was of the utmost seriousness. His failure to properly respond to this accusation (as documented below) – regardless of its ultimate veracity – is of serious legal concern.

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6 November 2013: Director Fitzgerald’s executive assistant Mr. Jackson W. Muller – CPA, CFE, CGFM states in an email to me that he had brought my concerns to the Director’s attention, and that the Director would personally review the 5 November email at some point in the near future.

13 November 2013: Mr. Muller states in an email to me that the Director had read my 5 November email and “has someone looking into this”.

Note: As of this date, Director Fitzgerald has acknowledged, through Mr. Muller, that he has read and understands the allegations in the email. Mr. Muller’s statement that the Director “has someone looking into this” clearly demonstrates that the Director has at least enough concern regarding the allegations to look into the matter further.

Also, the fact that the Director personally appointed someone to look into the matter is relevant to the context of my January 2014 conversation with Deputy Director Anita Bales (later promoted to Director following Mr. Fitzgerald’s retirement), so that should be kept in mind when considering that conversation.

14 November 2013 – 2 December 2013: We conduct our examination of CSM’s disclosure statements. We note the following findings pertinent in the context of this discussion:

- CSM books and bills the Government for its leave payouts on the cash basis.
- CSM bills the Government for 100% of its pension contributions on the cash basis even though a substantial portion of those contributions are expressly unallowable under 2 CFR § 220 because they are being allocated to prior year pension costs.

3 December 2013: Ms. McKune visits the Denver Branch Office on official business.

Note: During her visit, Ms. McKune unilaterally determined that my habit of wearing a hair covering (I have long hair) while in the office (not in the field or in meetings with Government officials outside of DCAA or contractors) violated the DCAA dress code. I had been wearing the head covering for a considerable period of time prior to this incident with the knowledge and implicit approval of my supervisor and FAO Manager.

Mr. McKune ordered Mr. Jones to have me remove the covering. Ms. McKune did not cite any provision of the dress code or other rule or law that could reasonably be interpreted to support her determination. Furthermore, she was unable to cite any other instance where a DCAA employee had been asked to remove a hair covering. She did not make any attempt to inquire of me for the reason I wore a hair covering, nor did she make any attempt to inquire whether it had any religious or medical significance.

It so happens that the covering did not have any religious or medical significance to me, but Ms. McKune could not know that because she did not ask, nor did she instruct any of her subordinates to inquire on her behalf, and she is most certainly required under the 1st Amendment and its application of rule or law (e.g., the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et. seq.) to make such an inquiry before ordering
a head covering removed given the number of ‘mainstream’ religions that mandate head coverings of various kinds.

Mr. Jones and Mr. Quant both stated that in their opinion, the head covering did not violate the dress code.

3 December 2013: I email Mr. Eric Shipley of CMS to discuss the CSM issue. I state:

DCAA is currently conducting an examination of a public institute of higher education and we have hit a snag. This Institution pays into a defined benefit plan at the state's public employee retirement association. The plan in question has been routinely underfunded, and has also suffered losses on plan assets in excess of actuarial estimates. As a result, the PERA has implemented supplemental contribution rates levied on employers (including the Institution) to make up both for past underfunding, and for losses on plan assets. The institution includes all of its contributions in its fringe pool and allocates a portion of those costs to Federal government contracts and grants. However, we note that 2 CFR § 220, Appendix A(J)(10(f)(3)(a) (ex OMB Circular A-21) states:

Costs of the institution's pension plan which are incurred in accordance with the established policies of the institution are allowable, provided such policies meet the test of reasonableness, the methods of cost allocation are equitable for all activities, the amount of pension cost assigned to each fiscal year is determined in accordance with subsection (b), and the cost assigned to a given fiscal year is paid or funded for all plan participants within six months after the end of that year. However, increases to normal and past service pension costs caused by a delay in funding the actuarial liability beyond 30 days after each quarter of the year to which such costs are assignable are unallowable.

Therefore, some portion of the supplemental rates appear to be a payment of 'principle' either caused by the underperformance by plan investments, or amounts that would have been contributed had the plan been fully funded on time. This portion is an otherwise allowable cost. The remaining portion of the supplemental rates appear to be a payment of 'interest' required due to the underfunding of the full actuarial liability in past years. To put it another way, some portion of the supplemental rates appears to be used to make up for the time value of money that was lost when the plan was underfunded. Some or all of this amount would appear to be unallowable per 2 CFR § 220, Appendix A(J)(10(f)(3)(a) insofar as the difference between what would have been paid had payment been made on time and the amount actually paid more than thirty days after the end of the calendar quarter in which the liability accrued is unallowable.

…
As such, any guidance you could provide on this issue, especially if you have encountered it before, would be much appreciated.

The purpose of this missive was to determine whether the pension issue at CSM had previously been addressed by the Government at another institution and whether we might gain valuable insight into CSM’s situation from the same.

6 December 2013: I contact Director Fitzgerald via email to communicate essentially the information summarized above regarding Ms. McKune’s order. I specifically state that it appears to me that Ms. McKune’s policy decision exceeds her authority, is not compliant with DCAA policies nor the Collective Bargaining Agreement, and ultimately appears to be designed to apply to only one person – me! I also state that this could be considered an attempt to improperly retaliate and/or coerce me related to the NEON engagement.

Note: This email was deleted from the final archived working paper package.

Later on 6 December 2013: Mr. Muller responds via email and states that he will bring the issue to the Director’s attention. In the meantime, I replace the head covering (a bandana-like head scarf) with a gentleman’s dress 8-quarters cap (this precise cap in fact: http://www.villagehatshop.com/photos/product/standard/4511390S60895/-/60895.jpg) whilst in the office, and not meeting with officials outside of the Agency. Mr. Quant and Mr. Jones approve the switch and agree that it adequately addresses Ms. McKune’s concerns. At any other time, I continued my previous practice of using clear hair gel to keep my hair styled in an appropriately professional fashion.

Note: Following further communication from DCAA management, the precise details of which I am not privy to, both Mr. Jones and Mr. Quant changed their minds on or about 19 December 2013. Because neither was able to articulate a justification for changing their position, and taking into account the other alleged misconduct related to the DCAA management officials involved, I must conclude that they were improperly influenced by DCAA management. Therefore, I then and now consider the order by Ms. McKune to be an improper assertion of authority, and further conclude that it is and was likely a form of unlawful retaliation designed to punish me for the covered disclosures discussed above and/or an attempt to coerce me into being more compliant with Ms. McKune’s positions in future. In either case, such a motivation for the act, if true, would clearly violate the Whistleblower Protection Act and possibly other rule and law. Ms. McKune’s order remains in effect as of this date.

19 December 2013: Ms. McKune learns from a person or person(s) unknown on or before this date that I am wearing the professional cap discussed above. She ordered (I believe through Mr. McAfee) Mr. Jones to order me to have no head coverings of any kind, at any time during my employment with DCAA under the threat of disciplinary action. Therefore, Mr. Quant and Mr. Jones order me to remove the hat and refrain from wearing any head covering of any kind from this point forward. At no time does any person at DCAA make any attempt to inquire as to my reasons for wearing a hat, including – most importantly – whether I am doing so for a religious reason.
Note: Neither Mr. Quant nor Mr. Jones could cite any written DCAA policy that would purport to be a blanket ban on head coverings. Both attempt to cite the DCAA dress code provision on clothing that made ‘other employees uncomfortable’, but I stated then and note now that such a vague and subjective standard is unenforceable given that ANY piece of clothing is likely to make SOMEONE uncomfortable. For example, a female Muslim employee wearing a hijab would doubtless make many DCAA employees who are veterans of the wars in Iraq and Afghanistan very uncomfortable, but there is no doubt whatsoever that the employee would have the near-absolute right to wear that religious head covering and even an inquiry by DCAA management into the matter is likely to violate the First Amendment. Therefore, the attempt to apply the vague ‘uncomfortableness’ standard in the dress code is problematic on its face, and particularly problematic when attempts are made to apply it to a blanket ban on head coverings that not only does not exist in writing but, again, appears to have been made up by Ms. McKune on the spot and only apply to me.

I write to Director Fitzgerald again on 19 December via email and note the following issues:

First, as we noted before, there is not [any] mention of headwear in the CBA dress code. Second, a business-dress appropriate hat (an 8-quarters cap, a fedora, or the like) is a recognized and acceptable part of business dress and is not inappropriate (compared to, say, a baseball cap, which would clearly be inappropriate). Third, an outright ban on headwear creates serious 1st Amendment freedom of religion concerns (e.g. for orthodox Jewish or Muslim employees). Fourth, once again it appears very strange that a senior executive is concerning herself with a dress code issue at a branch office. Fifth, I must once again state that I feel that this issue is being used as leverage due to the disagreement between the FAO and Region regarding the NEON engagement and is causing serious independence issues. Sixth, McKune's assertion that "legal" has approved her headwear ban should be verified and, if true, should be supported by a written legal opinion provided to both myself and the Union and enforced on a DCAA-wide basis.

I urge that Director Fitzgerald provide supervision from DCAA Headquarters to address this matter as I “a junior employee” have been unable to deal with the problem.

Note: This email specifically accuses Ms. McKune of utilizing the ‘hat’ issue to retaliate against and/or coerce me related to the NEON engagement.

This email was deleted from the final archived working paper package.

While I agree that a disagreement over a hat is silly, the evidence that Ms. McKune’s actions towards me were arbitrary, capricious, and contrary to rule or law is most definitely relevant in context and supports my allegations against Ms. McKune of a pattern of misconduct.

It is possible, although I no evidence to support such an allegation (other than Ms. McKune’s other misconduct and general bad faith), that Ms. McKune's actions are motivated by keeping my hair long in the first place, which is a cultural tradition of my Native American ancestry (I am part Cherokee). This should be investigated as a possible EEO violation.
20 December 2013: I am called to FAO Manager Jones’s office to discuss the ‘hat’ issue. I write an email to Director Fitzgerald summarizing that conversation:

I just finished speaking to my FAO Manager [Mr. Jones] who was passed on a message via my RAM [Mr. McAfee]. Apparently, the Deputy Director [Ms. Bales] contacted the DRD Ms. McKune at some point today. The issue appeared to be that there was some question over whether I was asserting a religious objection to the 'hat ban' in my previous email. While I do not think my previous email made such an assertion, some clarification is apparently necessary.

Ms. McKune's decision, as communicated to me, is summarized as: 'thou shalt not wear anything upon thy head whilst in the office'. Amongst my list of objections to said 'policy' was the fact that an outright ban on all headwear (barring an articulated safety concern) is facially unconstitutional due to the numerous religious groups that wear headwear as part of their religious practices. This is settled law. I noted orthodox Jews and Muslims as specific examples of religious groups that would object to such a ban. I did not state or imply that I myself was making a religious objection, but rather that there were religious objections to the 'policy' and that the Director might want to consider whether a total ban on headwear was legal, or in the best interests of the Agency.

My goal was simply to point out that Ms. McKune's position was untenable, that it appeared to me that she was creating a 'policy' that did not actually exist as a formal Agency directive, and only applied to me. I further noted that I am concerned based on Ms. McKune's pattern of conduct that this latest move is simply further retaliation/intimidation related to the NEON audit. If that is indeed the case, it creates serious implications for the Agency vis a via GAGAS. In any case, the highly unusual (nigh unprecedented) attention that a senior government official is paying to my clothing is deeply [disturbing] on a personal level, and makes me feel very uncomfortable.

Therefore, as I previously stated, some adult supervision from Headquarters would be appreciated.

Note: This email again specifically accuses Ms. McKune of utilizing the ‘hat’ issue to retaliate against and/or coerce me related to the NEON engagement.

30 December 2013: Mr. Muller responds to the email above and states that he will examine the issue when he returns from vacation on 13 January 2014.

8 January 2014: I send an email in regards to the CSM audits to Mr. Jones. I later revise the email based on new information and summarize some of my activities related to CSM between 29 November 2013 and 8 January 2014 as follows:

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Per your request of 8 January 2014, below is a summary of my findings regarding the University of Colorado system.

It is my understanding that the University of Colorado system falls under the audit cognizance of the United States Department of Health and Human Services: Office of the Inspector General for purposes of determining the allowability, allocability, and reasonableness of the institution's costs billed under Federal awards, the institution's compliance with the Cost Accounting Standards, and the adequacy of its accounting system and internal controls to bill under Federal awards. However, I have found substantive evidence that HHS does not do the necessary audit work to fulfill these functions.

You will recall that our purpose for looking at CU was to inquire how HHS was handling audit issues that we found in our audits of the Colorado School of Mines (for which DCAA has direct cognizance) and that we thought might also be occurring at CU.

To this end, on 29 November 2013 I contacted the Department of Health and Human Services, Office of the Inspector General, Audit Services Division at (202) 619-3155. I was referred on 2 December to the Region VII Office of the HHS-OIG at (816) 426-3200. I spoke to Mr. Pat Cogley who referred me to Ms. Jenenne Tambke at the Jefferson City Office. Ms. Tambke is the lead pension specialist for HHS. I spoke to Ms. Tambke at (573) 893-8338 ext. 21 on 3 December. Ms. Tambke stated that HHS has never routinely worked with cost allowability at CU because HHS only audits pension under 2 CFR § 225 (ex OMB Circular A-87). She referred me to Mr. Eric Shipley at (410)786-6381. Mr. Shipley is a senior member of the Cost Accounting Board staff and employed with the Office of the Actuary of the Centers for Medicare & Medicaid Services. Ms. Tambke stated that he was effectively the Federal Government's top pension expert. He is also listed in the DoD FAR Teams list (http://www.acq.osd.mil/dpap/dars/far_teams.html). She recommended that we contact him for guidance. She stated that if the issue had come up before anywhere in the government, he would know about it. I sent an email to Mr. Shipley on 3 December 2013.

On 6 January 2014 I received a call from Mr. Bill Hill at the HHS-OIG as a follow up to my email to Mr. Shipley. Mr. Hill indicated that to the best of his knowledge HHS only audits pension costs for private employers, Medicare/Medicaid costs, and is "involved" with the A-133 Single Audit process at CU. To the best of his knowledge, they do not perform independent cost compliance audits on a routine basis.

On 8 January 2014 I called Ms. Patricia Dodson at the University of Colorado at Boulder Office of Research Administration to determine who the cognizant auditor actually was. Ms. Dodson stated that the heretofore mentioned Mr. cogley was the cognizant auditor. I was then referred to Ms. Stephanie Furman at (303) 492-2396. Ms. Furman handles the indirect rates for
CU-Boulder. Ms. Furman stated that the rates were approved by the Department of Health and Human Services Division of Cost Allocation, but that the HHS-DCA is not an audit organization and does not conduct "audits". She referred me to Mr. Earnest Willard at the HHS-DCA.

I called Mr. Willard at (415) 437-7832 to discuss the issue. Mr. Willard stated that the HHS-DCA approves the indirect rates for all universities under the cognizance of HHS -- including 154 CAS covered universities. However, Mr. Willard stated that the HHS-DCA does not employ any auditors or conduct ANY audits of the indirect rates at any of the universities, including the CU system. Instead, the HHS-DCA relies on the work of the public audit firm(s) annual Single Audit report under OMB Circular A-133. Thus, for the vast majority of public educational institutions in the United States, there are no audited indirect rates.

I reviewed the CU-Boulder FY 2011 financial statements and supporting documentation. CU-Boulder reported that 83% of its grants and contract revenues came from the Federal Government. In FY 2011-FY 2012 ALONE CU-Boulder received more than $295 million in Federal research grants, of which $17.9 million was from the DoD. In FY 2011 CU-Boulder received $165.9 million in actual cost reimbursements under Federal awards.

I reviewed audits of CU by HHS that I could find on the web. The last audit I can find at CU-Boulder is dated 28 November 1995, and was a limited scope review of recharge centers and net interest on pooled investment balances. There does not appear to have been an HHS audit of CU-Boulder in the last decade. As either/both HHS or the institution must publish all public university audits, the fact that I cannot find any other engagements strongly suggests that there ARE no other engagements.

I reviewed the CU-Denver FY 2011 financial statements and supporting documentation. CU-Denver includes both the University of Colorado at Denver and the University of Colorado medical school at Anschutz. CU-Denver reported total Federal research awards made in FY 2011-FY 2012 ALONE of $269 million, of which $12.4 million was DoD.

I reviewed audits of CU by the HHS-OIG that I could find on the web in case the OIG was conducting audits independent of the HHS-DCA. The HHS-OIG conducted an examination of CU-Denver and issued a report dated June 2013 regarding the allowability of costs at CU-Denver. See: http://oig.hhs.gov/oas/reports/region7/71106013.pdf That examination examined costs between 1 October 2009 and 30 September 2010. During that period, CU-Denver had $222.7 million in government grants, contracts, and other agreements spread across 1,247 individual awards. However, the HHS-OIG sampled only 200 transactions, 100 salary and 100 non-salary. Therefore, while the HHS-OIG stated that it conducted its examination in accordance with GAGAS, I have serious questions as to that assertion given the tiny sample size and limited scope for an institution of that size. HHS projected the results of the sample despite the facial deficiencies in the sample. This is the
only audit of CU-Denver conducted by HHS between 2008 according to the OIG and CU-Denver websites, and I also cannot find any mention of audits conducted before that date either.

In total between CU-Boulder, Denver, and Colorado Springs the University of Colorado system reported $565.3 in Federal awards for FY 2012.

It is worthy of note that CU has CAS disclosure statements. CU-Boulder's initial disclosure statement was dated 30 June 1997. A revision (Revision 01) was submitted on 31 March 2008 with a modification submitted on 30 April 2009. See http://www.colorado.edu/abs/sites/default/files/attached-files/ds2.pdf Someone has to be auditing those disclosure statements. I found a letter from HHS dated 25 June 1999 from HHS approving the initial disclosure statement based on an audit from the HHS-OIG. See http://www.colorado.edu/vcr/sites/default/files/attached-files/Accounting%20Cert%201999.pdf Therefore, it appears that HHS must be doing some audits at CU, at least related to the disclosure statements. However, I cannot find any of the audit reports regarding the most recent disclosure statement for CU-Boulder.

Compare all of this to our examinations of the Colorado School of Mines (a MUCH smaller institution for which DCAA has cognizance), which we conduct at LEAST annually. We currently have an FPRP, an incurred costs, a CAS Disclosure Statement and several noncompliance engagements open at that institution. Therefore, the fact that we can only find a single cost allowability audit report in the last half-decade for the entire University of Colorado system is deeply concerning. Add to that the fact that the HHS-DCA is conducts no rate audits whatsoever ...

Thus, it appears that HHS is not conducting the appropriate level of audit effort to protect the government's interest at the University of Colorado's various institutions. If the DoD is relying upon HHS to protect DoD awards at CU, which appears to be the case, that reliance is not supported by sufficient audit effort and may result in damage to the DoD both in financial and political terms if it turns out that no one has been conducting the appropriate audit effort on DoD awards to CU. Note that auditable dollar volume for the entire University of Colorado system at DoD's participation rate was $30,704,244 for FY 2012. The idea that $30 million of DoD money is sitting out there completely unaudited is terrifying.

As such, I concur with your recommendation that this information be communicated up the chain of command in as expeditious of manner as possible to ensure that SOMEONE audits the University of Colorado System to protect the DoD's interests in our awards to CU.

If it turns out that no one is auditing CU and, thus, DoD's interests are not being protected by ANYONE, that would be a major oversight.

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If it turns out that no one is auditing the rates of ANY of the 154 CAS covered institutions under HHS, and, thus, DoD's interests at ALL of those institutions are not being protected, that would be a screw-up of epic proportions and DCAA management will no doubt want to be made aware of this fact as soon as possible.

I also provide a copy of the original email to Director Fitzgerald. Later on 8 January I write to Director Fitzgerald and provide the revised email, I also note:

We determined that the situation is actually WORSE than my original email had supposed. The revised email to my FAO Manager for transmission to Region and incorporating the latest information is below. I hope that we are missing something here, but based on the facts before us, it appears that the United States Department of Health and Human Services has utterly abrogated its responsibility to audit the indirect rates of at least 154 colleges and universities in the United States.

I therefore recommend swift action to determine what exposure DoD may have in this matter.

Note: If HHS has in fact failed to audit any of the institutions of higher education within its authority (which includes most major public institutions of higher education) that represents a serious failure in oversight that potentially puts billions of dollars of taxpayer money per year at risk of fraud, waste and abuse without proper regulatory oversight. This is potentially a mind-boggling oversight failure – especially considering that DoD scrupulously audits the (primarily smaller) institutions under our oversight. Subjecting most smaller institutions of higher education (under DoD) to rigorous audit oversight but not subjecting most larger institutions (under HHS) to any audit oversight (but only reviews and other non-audit oversight) makes no sense and in and of itself constitutes a gross waste of taxpayer money insofar as using millions in taxpayer money to audit smaller institutions instead of spending that money on auditing larger (and, thus, more risky) institutions is unquestionably wasteful.

Note: These emails represent a whistleblower disclosure of a suspected violation of rule or law related to the auditing requirements for institutions of higher education. They also represent a whistleblower disclosure of suspected gross fiscal waste associated with the same. Again, the apparent failure by HHS to audit billions of dollars in Federal grants funds per annum over a period of ten years or more appears to be both unlawful, and a serious risk of wasted Government funds.

10 January 2014: I undertake an additional revision of the NEON SOCARs and provide them to Mr. Quant. DCAA Headquarters conducts a telecon to discuss NEON. I write Director Fitzgerald an email summarizing the situation, including the following:

On 10 January a brief teleconference occurred between the Denver Branch Office, Central Region Office, and HQ Policy (Assistant Director McKenzie) to discuss the impact of the top-level discussion with the NSF-OIG in regards to contingency costs (especially in light of the recent release of 2 CFR § 200 - the OMB convergent guidance). The conclusion of that
meeting was that no audit reports dealing with contingency should be issued until the contingency issue is resolved between DCAA and the NSF-OIG at the highest level. The reason given was that DCAA issued two contradictory audit reports on that issue. I would first like to note that I informed the Central Region RAM, Mr. McAfee, and the Central Region Director Mr. Carr in May of 2013 that it appeared that contradictory reports could be issued by different FAOs on the contingency issue, and I recommend that Headquarters be involved before any reports were issued to ensure uniformity. You will also recall from my previous emails on this subject that Mr. Carr stated to the NSF-IG herself that he would go to the General Counsel to get an opinion on the contingency costs on an Agency-wide level within a week, and before we proceeded on the engagement. As I stated previously, there is no evidence that request was ever submitted to the GC, and the result is that the Agency has embarrassed itself by taking the exact opposite stance on the same issue in two reports issued virtually simultaneously. I also note that the convergent guidance issued by OMB on 26 December 2013 resolves the separate tracking issue that we were struggling with by stating that no such separate tracking is required.

I also note that the NEON engagement involves a dozen other issues totally unrelated to contingency costs. Therefore, I strongly recommend that consideration be given to issuing the audit report with a scope limitation for the contingency issue. A supplemental report can then be issued once the contingency issue is resolved. Otherwise, DCAA can justifiably be accused of sitting on major audit findings for almost nine months and counting with no defensible reason for doing so. Indeed, the Central Region DRD has had the audit report draft for four months now and has yet to make an official ruling on any of the disagreements between the FAO and the RAM. Given that the NSF-OIG will be reporting to Congress on this issue sometime this Spring, it would behoove us not to still be sitting on this report at that time lest we be excoriated before Congress yet again. There is also the fact that the NSF-OIG is aware of the conflict between the FAO and the Central Region on this issue. If the IG were to request that Congress call DCAA personnel to explain themselves (a move that could be used to deflect criticism that the IG has not provided Congress with the DCAA audit results she stated that she would provide in her testimony last year), the Agency would not look very good.

Note: As prophesized, the Director of DCAA, by then Ms. Bales, was indeed called to answer for the Agency before the Congress (the House Committee on Science, Space and Technology) on 3 December 2014. It did not go well. The Agency was accused of incompetence, and the Director was unable to adequately defend it.

13 January 2014: Mid-Atlantic Technical Specialist Tony Baylor writes to Mr. Jones by email and informs him that the technical review of the NEON working papers has only been in process for a week and will take some time to complete. This (arguably unnecessary) technical review continues to delay the audit.

Note: As prophesized, the Director of DCAA, by then Ms. Bales, was indeed called to answer for the Agency before the Congress (the House Committee on Science, Space and Technology) on 3 December 2014. It did not go well. The Agency was accused of incompetence, and the Director was unable to adequately defend it.

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14 January 2014: Mr. Muller responds to my email to the Director and states: “Alerting your FOA Manager is the right thing to do. Accordingly, Mr. Jones is in the best position at this stage to determine the appropriate action to take next.”.

I respond:

Appreciate the feedback, however, the FAO Manager and I are both concerned that issues seem to be getting hung up at Central Region and never getting to Headquarters despite assurance from Central Region that they are being passed up the line. See the NEON situation. He is aware that I have been bypassing Region and also passing the most important issues on up the line directly to HQ -- and he is passing the [same] information through the chain of command and our hope is that at least one of the channels will actually work. Obviously, it would be better for all involved if we could all work through the actual chain of command (FAO-Region-Headquarters) rather than this awkward ad-hoc basis we have had going for a few months now, but frankly I have no confidence that these issues are being handled appropriately by Central Region. Until I attain such confidence, I am required by law (not to mention ethics) to report the information directly to Headquarters.

Note: Again, the gist of my comments to the Director is that Central Region management is deliberately and unreasonably interfering in the professional judgment of auditors at the Denver Branch Office and thereby impeding our ability to perform our audits. The safeguard I try to put in place (in accordance with the AICPA Code of Professional Conduct) was to notify the Director personally.

21 January 2014: I provide another revision of the NEON SOCARs to Mr. Quant and Mr. Jones, this time incorporating some references to the new 2 CFR § 200 regulations. I note that I have only incorporated those references into two of the SOCARs and still need to do so for the others.

Later on 21 January I provide yet another revision to Mr. Quant and Mr. Jones, this time with all relevant 2 CFR § 200 references included.

22 January 2014: DCAA Deputy Director Anita Bales contacts me via telephone and leaves me a voicemail requesting that I call her to discuss the NEON engagement privately.

23 January 2014: I discuss Ms. Bales’s request with Mr. Quant. I ask whether Mr. Quant has ever heard of the Deputy Director of the Agency calling a junior employee for a private conversation about an audit without the supervisor or FAO Manager present. Mr. Quant respond that he is unaware of any such situation, or anything even close to it, occurring before. Nevertheless, he instructs me to respond to Ms. Bales and make myself available to her. We agree that it is likely that she was the person Director Fitzgerald assigned to 'look into' the NEON audit, as Mr. Muller stated on 23 November 2013.

Therefore, I contact Ms. Bales by email later on 23 January and state that I am available to discuss the matter at her convenience.

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Ms. Bales responds by email and asks if I am available on 24 January. I respond and state that I am.

24 January 2014: Ms. Bales emails me at 9:19 AM MST and asks if I am available to talk at 9:30 AM MST. I respond and state that I am.

I document my discussion with Ms. Bales during the conversation and sign off on it the same day. A copy of my minutes of the conversation and analysis of the same follows:

In accordance with a telephone request (confirmed by email) from Ms. Anita Bales, Deputy Director of the Defense Contract Audit Agency, a teleconference was held between Director Bales and Mr. J. Kirk McGill, Auditor, Defense Contract Audit Agency on 24 January 2014 beginning at 9:30 AM Mountain Time. The purported purpose of the teleconference was to discuss the status of the Denver Branch Office’s examination of the accounting system of the National Ecological Observatory Network, Inc. of Boulder, Colorado on a post-award basis. Details of that engagement, including specific dates for the events summarized below, may be found in the audit working papers under DCAA Assignment No. 03121-2013J17741001. The following information was prepared on the afternoon of 24 January 2014 by Mr. McGill, directly from Mr. McGill’s contemporaneous notes taken during the course of the events described.

In brief, the Denver Branch Officer attestation team (J. Kirk McGill, Lead Auditor; Dan Gerleve, Senior Auditor; Michael Quant, Supervisory Auditor; Angie Vail, FAO Assistant for Quality; and Allen Jones, FAO Manager) identified and agreed upon eight noncompliances related to NEON’s accounting system, and the Regional Audit Manager (Jerry McAfee) disagreed with that determination. The matter was properly elevated to the Deputy Regional Director, Central Region (Martha McKune). DRD McKune declined to either read the audit working papers, or render a decision. Instead, DRD McKune directed that the entire audit file, unread by her own admission, be sent to the Mid-Atlantic Region Chesapeake Bay Office for a specialist review of the risk assessment and working papers. Thus far, that review has not been completed and provided to the Denver Branch Office.

Early in the audit when it became clear that serious noncompliances existed and instances of fraud appeared to exist, the Lead Auditor (McGill) issued a DCAA Form 2000 to the Office of the Inspector General of the National Science Foundation (the cognizant law enforcement agency) and also wrote to the Director of the Defense Contract Audit Agency (Patrick Fitzgerald) at his secondary email address input@dcaa.mil to make the Director personally aware of the seriousness of the issues disclosed by the engagement, including the possibility that NEON had colluded with the National Science Foundation to defraud the Federal Government. Mr. McGill repeatedly contacted the Director at said email address and provided specific information about the audit, including the delays and undue interference from the Central Region in the audit process that occurred after the initial findings were communicated to the Central Region. Mr. McGill explicitly requested that
DCAA Headquarters provide oversight and direction on the audit going forward to prevent undue influence and delays. Mr. McGill received a series of email from the Executive Assistant to the Director, DCAA (Jackson Muller) who stated that the Director had appointed someone to look into the NEON audit. Mr. McGill naturally assumed that Director Bales was that person given that neither he nor any other person at the Denver Branch Office had ever discussed NEON with Director Bales.

In context of the above, Mr. McGill intended to begin the teleconference by determining how much knowledge Director Bales had of the audit, and then fill in the gaps before requesting her thoughts on how to proceed in resolving the matter. However, Director Bales instead spent virtually the entire phone conversation talking about Mr. McGill personally. She repeatedly criticized his personality, his dedication and fitness for government service in general and DCAA service in particular and repetitively questioned whether he wanted to continue working for DCAA. Out of a conversation that ran well over an hour, perhaps five minutes were actually spent discussing the NEON engagement, and the entire five minutes consisted of Mr. McGill explaining the audit to Director Bales. At no point did Director Bales offer any specific advice, observations, insights, or instructions on the NEON engagement. Instead, Director Bales consistently directed the conversation back to Mr. McGill personally. Director Bales stated on several occasions that Mr. McGill acted like “one of them” as opposed to “one of us” – which he took to mean that Director Bales considered Mr. McGill to be an enemy of DCAA in general, and Director Bales specifically. Director Bales repeatedly stated that she was “offended” by Mr. McGill’s words, actions, personality, and service with the government. Director Bales expressed further ‘offense’ with Mr. McGill’s insistence in following the proper legal procedures relating to the reporting of possible fraud (a major issue in the NEON engagement), and commented that if he wished to continue in Government service, that he should strongly consider not ‘rocking the boat’. Director Bales questioned Mr. McGill’s professional qualifications to make a finding of possible fraud, despite the fact that Director Bales should have been aware that Mr. McGill was both a Certified Fraud Examiner and a Certified Forensic Accountant – both internationally professional fraud investigation credentials (Mr. McGill notified the Agency that he possessed both credentials, and listed them after his name in his emails with Director Bales prior to the teleconference). Director Bales further stated on several occasions that Mr. McGill should consider a career outside of Federal service, stating that perhaps he should become an attorney because his personality was utterly unsuited to be a civil servant in general, or an auditor specifically.

The teleconference ended with no substantive discussion of the NEON engagement. It is also worthy of note that at no point did Director Bales mention whether she was the person appointed by the Director to look into the NEON engagement, or mention the emails between Mr. McGill, the Director, and Mr. Muller. Mr. McGill must, therefore, continue to assume that Director Bales acted under the direct order and control of Director Fitzgerald in this matter.
Subsequent to the teleconference, Mr. McGill discussed the matter briefly with Mr. Quant and Mr. Jones. He asked whether it was routine for the Deputy Director of the Agency to call a G/S: 11 auditor to discuss his personality defects and future career (or lack thereof) in Federal service. Mr. Quant and Mr. Jones both stated that they had never heard of an instance of a senior DCAA officer calling such a junior employee to discuss anything, much less something as esoteric as their personality or career choices. Mr. Jones also expressed profound “disappointment” that the requested assistance from Headquarters did not appear to be forthcoming.

Based on the foregoing information, Mr. McGill has no choice but to conclude that Director Bales was threatening his future employment with DCAA if he failed to back off of the NEON engagement and continued ‘rocking the boat’. Mr. McGill assumes that Director Bales is referring to sending requests for assistance directly to Headquarters and bypassing the normal chain of command (which he justified in his emails to the Director by stating that the chain of command was part of the problem, a fact that Director Bales did not every give him the opportunity to communicate to her), as well as his insistence that fraud appeared to be occurring not just at NEON, but at the National Science Foundation (the grant officer) as well – a very serious accusation that could certainly be considered rocking the proverbial boat. However, Mr. McGill had no concrete evidence beyond his opinion as a certified fraud investigation professional that anything unlawful (improper attempts to influence a Federal officer and an official Federal report) had occurred. Therefore, he resolved to document the circumstances in the audit file and revisit the issue at an appropriate juncture with the hope that this event, when combined with the other unusual and/or improper events that have occurred during the NEON engagement and seem likely to continue to occur, will in the aggregate support his position that DCAA management has attempted and continues to attempt to improperly influence the outcome of the NEON engagement – and specifically to compel Mr. McGill and the Denver Branch Office to withdraw their finding that NEON and officers of the NSF appear to have conspired to defraud the United States Federal Government.

Note: As stated in my contemporaneous signed notes, it is my professional opinion that the purpose of Ms. Bales’s phone call was to threaten and intimidate me into backing off of the NEON audit findings under threat of adverse employment action. As my activities related to the audit findings include whistleblower disclosures, something that Director Fitzgerald was aware of prior to Ms. Bales’s phone call, I took at the time and continue to take her comments as a threat to initiate prohibited personnel practices if I did not back down.

At bottom, there is no reasonable explanation for the second in command of all DCAA to personally call a junior auditor to discuss his suitability to Federal employment except as a thinly veiled threat to his future employment with the Government should he continue to pursue whistleblower disclosures related to NEON (or, for that matter, any other issue – given Ms. Bales’s comments regarding ‘rocking the boat’).
Therefore, as of this date I concluded that active and unlawful whistleblower reprisal/retaliation was occurring related to the NEON engagement.

Note: This document (labeled as Working Papers 07h and 07h-01 in the DBO approved package dated 4 April 2014) were also deleted from the final archived working paper package. The same analysis and conclusions related to the deletion of the documentation of the teleconference with Mr. McAfee and Ms. McKune discussed earlier, including the fact that the deletions could represent a criminal act, also apply here. At the very least, failure to retain this documentation violates GAGAS.

25 – 27 January 2014: I consult with my personal legal counsel regarding the NEON engagement, keeping at all times information restricted from disclosure under 18 U.S.C. § 1905 and other rule or law confidential, even from counsel. Although the whistleblower reprisal issues were front and center, the conversation also addressed DCAA’s entire disagreements policy framework and whether than policy complied with the Code of Professional Conduct (the “Code”) of the American Institute of Certified Public Accountants (“AICPA”).

28 January 2014: I write Mr. Jones via email:

I've attached my rough notes on the NEON ethics issue hereto. In accordance with AICPA guidance, I have asked my legal counsel for a formal interpretation, in sufficiently vague terms to protect confidentiality as required by rule and law, and expect that back within the next day or two. Once I have that in hand, I will draft a formal position in the event that I/we are overruled on NEON. Counsel's preliminary findings were that the DCAA policy violates the AICPA Code of Professional Conduct, that its engagements are therefore not in accordance with the AICPA Statements on Standards for Attestation Engagements, and thus are also not in compliance with GAGAS. Counsel states that reporting to the IG, GAO, and the AICPA on the noncompliance are likely required by rule and law.

Note: The attached document contains substantially the same information as the discussion of the Code earlier in this document.

As stated previously, the Denver Branch Office was ultimately ordered to remove nearly all of the audit findings, including the management fee findings. Despite the clear mandate from the AICPA that no person shall sign a document they believe is false or misleading, Mr. Jones is forced to sign the final audit report – even though he documented in the working papers that he disagreed with the results. He was thus forced to sign a document that he himself believed was false and misleading.

I again note that the actual falsity of the document is irrelevant. The only question relevant to the Code is whether Mr. Jones believed that the document he was signing was false or misleading.

Therefore, DCAA’s disagreements policy violates the Code on its face, and the Agency’s specific actions on the NEON engagement unquestionably violated the Code as well.
29 January 2014: I conclude that the actions of Ms. Bales were made on behalf of Director Fitzgerald for the reasons noted above; to wit, that she appeared to be the person that he specific appointed to ‘look into’ the NEON engagement. I therefore refereed the Agency’s actions related to the NEON engagement generally, and the actions of Mr. McAfee, Ms. McKune, Ms. Bales and Mr. Fitzgerald specifically to the DoDIG. DoDIG responded in an email and stated they had referred the matter to the DoD Inspector General, Administrative Investigations – Investigations of Senior Officials and assigned case no. 20140129-022038-01. The IG further stated “Due to privacy concerns, the Hotline cannot provide investigative details of cases, and we will not respond to status requests. The DoD Hotline will notify you when your case is closed.”

30 January 2014: We issue a draft SOCAR to CSM about the cash basis accounting for leave issue. The draft was approved by Mr. Quant and Mr. Jones prior to submission to CSM.

Prior to 4 February 2014: According to Mr. McAfee's statements on 2 April 2014, Ms. McKune officially overrules the audit, but does not tell the local attestation team that she has done so. We do not find out until 2 April. We are not afforded an opportunity to respond to Ms. McKune's decision or have any input into the process before her decision was communicated to the NSF-IG (the client) on 4 February and 26 March 2014. Further, we were unable to respond to the Mid-Atlantic Region review, which we did not receive until 14 March 2014, after Ms. McKune made her decision. This strongly suggests that the Mid-Atlantic review was nothing more than a red herring – a conclusion supported by the fact that Ms. McKune subsequently entirely ignored the fact that the Mid-Atlantic review concurred with roughly half of our findings whilst Ms. McKune’s decision overruled all of the findings.

4 February 2014: Mr. McAfee sends an email (note: This email was not provided to me by Mr. Jones, who was cc’d, until late March 2014) to NSF-IG Lerner including an email dated 31 January 2014 from DCAA Deputy General Counsel David Hoffman. His email states:

As you may recall, last May the DCAA Denver Branch auditors briefed the NSF-OIG on its preliminary conclusions it had reached concerning certain aspects of NEON’s accounting system. Those conclusions were preliminary in nature and had not yet been reviewed by myself or DCAA's Central Region management.

One of the issues raised by the Field Audit Office was related to NEON's practice of using the negotiated management fee to pay for expenses not reimbursable under the NSF cooperative agreement (that is, expenses considered unallowable under its cooperative agreements). The audit staff believed this practice resulted in the NSF contracting officer reimbursing NEON for unallowable costs and auditors' characterized the arrangement as potentially fraudulent.

The NSF-OIG requested that DCAA obtain a legal review of the issue and consequently we requested a legal opinion from DCAA's legal staff. I received the results of the legal review from David Hoffman, Deputy General Counsel, DCAA last week in the email message attached below.

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The legal review opined that the use of a management fee to pay unallowable expenses was not fraudulent. Further, it indicates the use of fee by nonprofit entities to pay for unallowable expenses is a common practice, but cautions the use of such fees should be monitored by the awarding agency.

I hope you find this legal review helpful. It will be incorporated into the Denver Branch Offices' audit working paper file and will be reflected in its final audit report.

(emphasis added).

Mr. Hoffman’s email states:

We have been asked to review a referral to the National Science Foundation (NSF) Inspector General (IG) by a Central Region auditor. The auditor suggests that a nonprofit contractor, the National Ecological Observatory Network, Inc. (NEON), and the NSF conspired to create a "management fee" to avoid regulatory limitations on unallowable costs. We disagree that the management fee arrangement amounts to fraud, but recommend that NSF more closely monitor the contractor's use of the fee.

NEON was created solely for the purpose of building a continent-wide system of ecological observatories for the NSF and its funding is "almost entirely" from the NSF. The management fee was implemented by NEON and the NSF because NEON was incurring certain costs in its normal operations that were, by regulation, unallowable, and due to its status as a nonprofit corporation working solely for NSF, was not able to fund. The resulting fee amounted to approximately .5% of the total award. NSF has permitted NEON to budget for the fee as part of its annual costs and segregate the unallowable costs into a separate account as if they were allowable costs. The auditor suggests that there is no authority for this practice within the regulations, and that the NSF and NEON have conspired to defraud the Government by entering into this arrangement to permit the charging of costs that are otherwise unallowable costs.

We agree that some of the costs being incurred are costs that would ordinarily be unallowable under normal cost principles (FAR Part 31 – which is not applicable here) as well as the cost principles for grants and cooperative agreements with nonprofit corporations (OMB Circular A-122).

The auditor suggests that in FY 2013, NEON billed for such costs as $25,000 for a Christmas party, $11,000 for coffee services for employees, $3,000 for Board of Director dinners (which included alcohol, $3,000 for t-shirts and other apparel for Contractor employees, $83,000 for "business development", and $112,000 for lobbying. OMB Circular A-122 contains provision that make costs for entertainment, lobbying, and alcohol unallowable. (Attachment B, sections 3, 14, and 25). We have found no specific authority for the practice of reimbursing unallowable costs as a management fee or fee.
However, the NSF General Counsel's office would be the appropriate organization to determine if such authority exists. As noted in the auditor's fraud referral, the use of a management fee in NSF cooperative agreements is common. NSF may have obtained a deviation from OMB Circular A-122 that this office would not be familiar with. Moreover, we note that the Department of Defense maintains a very similar practice for DoD Federally Funded Research and Development Centers (FFRDCs). See Department of Defense Federally Funded Research and Development Center Management Plan, dated April 25, 2011, Appendix E. The circumstances described in the management plan for the FFRDCs and those surrounding the creation of NEON are very similar.

Appendix E of the DoD FFRDC management plan, provides the following justification for permitting certain unallowable costs to be paid out of a "fee":

Since DoD strictly limits its FFRDC contractors in the types of work they may perform, frequently requiring them to work exclusively or predominantly for DoD, FFRDC contractors forego other sources of revenue. They thus have less flexibility than many contractors to cover "ordinary and necessary business expenses" that are normally not allowable on federal cost-type contracts. Fee may provide the operating flexibility needed to maintain a healthy company. Fee may reflect costs that will be used by the FFRDC contractors for a variety of other "ordinary and necessary" expenses not included in the above two categories. This includes reasonable allowance for management initiatives and investments that will directly or indirectly benefit DoD. In order for these expenses to become appropriate for consideration as a fee, they must be separately identified and justified in the fee proposal.

... Costs incurred under the FFRDC contract that are allowable under the cost principles (i.e. . . . OMB Circular A-122 .), regulations or statutes applicable to that FFRDC contract must be classified as direct or indirect (overhead/G&A) charges to the contract and not included as a proposed fee elements.

FFRDC Management Plan at E-1 to E-2. The FFRDC management plan demonstrates that under certain circumstances a fee or management fee is used to reimburse unallowable costs to nonprofit organizations performing work solely for the agency under grants or cooperative agreements. It does not appear to be some conspiracy on the part of the company and agency to defraud the Government, but an arrangement that permits companies to perform these functions on behalf of the agency and avoid bankruptcy. Therefore, we do not believe that there is any attempt to defraud the government.

However, we do believe that the NSF should take steps to monitor and control the costs that NEON incurs as a management fee. The FFRDC management plan envisions close
monitoring of the types of costs that are being incurred as a fee to assure they are appropriate and directly or indirectly benefit the federal agency. The monitoring process includes both a budgeting process where the specific costs are identified in advance, and an annual review of the expenditures to assure that the prior representations and justifications were reliable. This close monitoring is not readily apparent in the NEON cooperative agreement. **We suspect that there would rarely ever be a justification for a nonprofit organization to be reimbursed for lobbying costs.**

These statements are *beyond* concerning. As noted above, DCAA lacks any authority for even coming to these conclusions. DCAA is not a law enforcement agency, and does not have any authority to draw a conclusion regarding fraud.

Mr. McAfee attempts to justify this by stating that the review was requested by the NSF-IG. However, as noted above, the NSF-IG requested that management fees be reviewed from a cost-allowability prospective (which is within the authority of DCAA) not a criminal/fraud prospective (which is not).

As such, Mr. Hoffman’s action could justifiably be viewed as a deliberate attempt to undermine my referral of fraud to the NSF-IG insofar as the clear intention of the emails were to communicate to the NSF-IG that, in the official opinion of DCAA, no fraud had occurred. If indeed the intention of DCAA generally and Messrs. Hoffman and McAfee specifically was to undermine the fraud referral, their actions could be a violation of 18 U.S.C. §§ 1505, 1512 and 1516.

Furthermore, by communicating this information directly to the NSF-IG (the client) without consulting with the engagement partner equivalent (Mr. Jones) is a gross violation of the auditing standards. As the engagement partner, Mr. Jones bears ultimate responsibility for the audit results. By informing the client that the conclusions above “will be incorporated into the Denver Branch Offices’ audit working paper file and will be reflected in its final audit report”, Mr. McAfee subordinated the judgement of Mr. Jones, and all of his subordinates. As documented below, Mr. Jones stated to Mr. Quant and me that he believed his judgement had been entirely subordinated as of 4 February 2014.

5 February 2014: CSM provides its FY 2013 fringe incurred costs submission.

10 February 2014: We discuss the noncompliances with CSM, including the pension issue. During the discussion, we note that we require additional information from the Colorado Public Employees’ Retirement Association (“PERA”, pronounced ‘Pear-a’) to determine whether CSM complied with the pension funding requirements of 2 CFR § 220. CSM Controller Cusworth and I discuss the pension issue via email and he agrees to arrange for PERA to provide a detailed breakdown of CSM’s pension funding to show how much of each year’s contributions actually fund that years actuarial liability, and what amount goes to fund prior year costs not funded in a timely fashion. Since that latter amount is expressly unallowable under 2 CFR § 220 and could amount to millions of dollars of improper claims, this piece of
information is critical to the audits. Note that it required the FAO threatening to question 100% of CSM’s pension contributions as unallowable to get CSM to agree to provide the information.

11 February 2014: Background: my wife has a Federally recognized and diagnosed chronic illness that qualifies as a disability under the Family Medical Leave Act and the Americans with Disabilities Act. She frequently requires care due to acute attacks associated with her disability with little or no warning. Mr. Quant and Mr. Jones were fully briefed regarding her condition upon my employment with the Denver Branch Office and confirmed they were satisfied they had sufficient information to support accommodations for me to care for her. One of the accommodations provided was a “gliding” schedule where my designated start time was either 6:30 AM (later 6:00 AM) but I could report as late as 7:30 AM without prior notice if my wife had an attack that required care. Since her attacks mostly happen at night, this would give me flexibility to care for her and still meet my work obligations. If I expected to report to work later than 7:30 AM due to a need to care for her, I was to notify Mr. Quant by email or telephone and arrange to either push my workday back, or take leave – at his discretion. Prior to this date there were no major issues related to time & attendance. While the incident below was not related to my wife’s condition, that issue is necessary to understand my schedule and timekeeping.

Prior to 7:00 AM MST, I email Mr. Quant to inform him that I will not be in by 7:30 AM. I explain that I was very late getting home from my DCAA-sponsored college class the night before because I used public transportation (the Regional Transportation District light-rail system) to get to and from class, and the train had some sort of mechanical problem and I did not get home until after midnight. I estimated that I would be in by 8:30 AM MST and would take sick leave for the late start.

At 8:18 AM I informed Mr. Quant by email that I would not make my 8:30 AM estimated start time and stated I should be in by 9:30 AM, which I was.

At 10:08 AM Mr. Quant sent an email asking why it took me 2.5 hours to arrive at work (calculated from my pre-7:00 AM email).

I respond:

I was not feeling well at all this morning due to getting back home so late, and I did not want to come in until I felt like I could be productive -- which took longer than I expected. I felt that it would be dishonest to come in if I could not give 100%. So I took a couple of hours to work out, get a shower and some food and get myself in order, and now I'm rocking and rolling on CSM rather than zoning out at my desk. As noted in my original email, I intend to take sick leave for the missed time.

As noted here, the fatigue caused by getting home so late (from a DCAA-sponsored class, and due to no fault of my own) would have reduced my productivity unreasonably. Therefore, I wanted to take the time to ensure that I could be productive before I went on the clock.
12 February 2014: Mr. Cusworth states that CSM objects to the findings above, and will prepare a formal response the following week.

Mr. Shipley responds via email and asks whether he ever responded to my 3 December 2013 email. I stated that he had not via reply email.

13 February 2014: Mr. Quant summons me to his office at around 8:00 AM MST to discuss the incident on 11 February.

The conversation was totally unexpected and improper. Mr. Quant has recently begun micromanaging my time and requiring justification for any deviation from my planned schedule – or really anytime I am not sitting at my desk. I am extremely bothered by his actions as they represent a complete 180 degree turn from his previous (more relaxed) manner. I hypothesize that he may be receiving pressure from DCAA management to shut down my whistleblowing and/or make me miserable as retaliation for the same. During the meeting Mr. Quant spoke to me with a raised voice, an aggressive tone, and use unprofessional language, including cursing.

Note: As noted above, because Mr. Quant and I had not previously had a serious time/attendance/performance issue, I viewed Mr. Quant’s actions here as a continuation of the ‘hat issue’ from earlier where it appeared that Mr. Quant radically changed his position on the matter after pressure from management. To put it another way, I believed and continue to believe that Mr. Quant was pressured by DCAA management into ‘cracking down’ on me to retaliate against me for whistleblowing and did so out of fear the retaliatory action would be commenced against him if he did not comply. His later comments, documented below, especially his comment that he and Ms. Vaill “want to get promoted again” and therefore will not stand up to DCAA management fits this hypothesis.

I send an email to Mr. Jones at 8:33 AM MST requesting a meeting to discuss the situation. I state:

I just had a very unpleasant confrontation with Mike over several issues that has really upset both him and I. Some of the accusations that were thrown around were very serious, and very concerning - and frankly mostly came out of left field. I am hoping that this is just a case of Mike having a bad day and some stuff catching up with him (I understand that I can have that effect on people), but I have to take the matter with the utmost seriousness. I consider this situation urgent, and assert that it has had an immediate and detrimental effect on morale and personal welfare. As such, I am formally and officially requesting a meeting with you in person as the 2nd level supervisor to discuss the matter at the earliest possible convenience.

Mr. Quant sent me an email following the conversation (at 8:57 AM MST) to summarize the conversation:

This email is to summarize and document our discussion this morning.
Your leave on Tuesday, February 11, will be leave without pay. You indicated in an email to me that you were delayed in coming to work because you were working out, showering, and eating. None of these activities are reasons for taking sick leave.

Your assigned schedule, requested by you and approved by me, is 0730 to 1600. I expect you to work this schedule in the future unless you request and I approve a different schedule.

In the future, if you are late not due to illness you will not be allowed to charge annual leave, sick leave, or credit hours, you will need to charge leave without pay.

If you are sick and not able to come in to work or will be late, you will email or call me to notify me, as you have done in the past.

I consider your attempt to use sick leave for February 11 to be an abuse of sick leave. I read you a portion of the Collective Bargaining Agreement, section 5.6, and counseled you that continued and frequent use of sick leave, or use in unusual patterns or circumstances, may result in a written requirement to furnish acceptable documentation for each subsequent absence due to illness or incapacitation for duty, regardless of duration.

You are not to initiate discussions with Angie, Colin, Allen, or any other supervisor regarding an audit issue without my presence or permission.

Note: There are a couple of things about Mr. Quant’s instructions worthy of note.

Before discussing those, however, I note that during the meeting with Mr. Jones I presented far more information than is documented below. I have limited my commentary here for the sake of brevity, but the complete documentation package provided to Mr. Jones is available upon request.

With that said, here are the highlights:

1) He instructed me to take leave without pay for 11 February because my fatigue-reducing activities did not constitute proper use of sick leave. He did not request medical documentation or provide me with any opportunity to present evidence that the use of leave was proper.

I note that “weakness and fatigue” is a bona fide medical condition (see, e.g. www.webmd.com/a-to-z-guides/weakness-and-fatigue-topic-overview). Noted causes include “poor sleep” and “lack of exercise”.

I note that the DCAA Personnel Management Manual (“PMM”), Chapter 77 Leave Administration, Section 1, Subsection 4, Paragraph q states that sick leave may be used when an employee “… is incapacitated for the performance of duties by physical or mental illness …”. Weakness and fatigue clearly fits within this definition.

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I note that the PMM, Chapter 77, Section 1, Subsection 8 *Control of Absenteeism and Excessive Tardiness*, Paragraph b states:

It may be necessary to take progressively more severe and formal corrective action in cases of chronic offenders who fail to respond to discussions regarding their absences or use of leave. Supervisors may issue a leave restriction letter, which may include requirements for a doctor’s certification or other administratively acceptable evidence for each occurrence of leave, or imposing disciplinary action. **Prior to such action employees should be counseled and warned of any disciplinary action that is contemplated.** In all cases, supervisors should coordinate with the servicing human resources office regarding counseling employees and appropriate disciplinary action. *(emphasis added)*

2) Mr. Quant did not previously counsel/warn me that he was contemplating any disciplinary action. Indeed, we had never even discussed the topic of sick leave abuse *because none had previously occurred* or had even been suspected of occurring.

I note that the PMM, Chapter 77, Section 4 *Leave Without Pay …*, Subsection 1 states:

L[ave]W[ith]O[ut]P[lay] is a temporary absence from duty in a non-pay status that may be granted upon an employee’s request. **It cannot be imposed as a penalty nor can an employee be required to take LWOP.**

The Collective Bargaining Agreement, Article 15 also makes it clear that Mr. Quant’s actions were inappropriate.

Therefore, Mr. Quant’s order to take leave without pay was arbitrary, capricious, and contrary to rule or law.

3) He stated that future tardiness, not due to illness, would be charged to leave without pay. He did not specify, despite being requested to do so, whether caring for my wife would count as “illness”, or whether tardiness was only acceptable for *personal* illness. He provided no leeway for other exceptional circumstances that might cause tardiness in the future (for example, foul weather) without being improper. Again, this is not consistent with the PMM or the CBA.

4) He considered me attempt to use sick leave on 11 February to be “an abuse of sick leave” as defined in the Collective Bargaining Agreement. As noted above, he failed to request any medical documentation that might support my request, or provide me with any opportunity to present evidence that the use of leave was proper. He also made no attempt to take into account the fact that I was open and honest about the circumstances that caused the delay, and made no attempt to conceal or misrepresent what had occurred.

I note that his actions above do not comply with the due process requirements of the CBA or the PMM and Mr. Quant did not even attempt to justify how this single incident, even if I *was* in the wrong, could constitute a pattern of abuse.
5) He ordered me not to discuss any audit issues with FAO Manager Allen Jones, FAO Assistants for Quality Angie Vaill and Colin Eve, or any other supervisor on an audit issues without his presence or express permission.

I note that this has serious GAGAS implications related to my ability to exercise independent judgment. By forcing me to involve Mr. Quant in any discussions, there is – at least in appearance – danger of the subordination of my professional judgment.

6) He fixed my schedule from 7:30 AM to 4:00 PM MST with no mention of the potential issue with my wife’s illness, and over my request to set a different schedule – 6:30 AM – 3:00 PM MST.

Note: most importantly, Mr. Quant’s seemingly irrational and certainly improper actions above occurred less than two weeks after (we later found out) that Ms. McKune had decided to overrule the engagement partner Mr. Jones and his team (including me) on the NEON engagement. Therefore, a reasonable person could conclude that Mr. Quant’s actions were prompted by DCAA management’s alleged desire to undermine my professional credibility, threaten my employment, and otherwise retaliate against me and attempt to coerce me into not blowing the whistle on the alleged wrongdoing on NEON.

Therefore, a reasonable person with full knowledge of the facts could easily conclude that Mr. Quant’s actions were part of a (what would later appear obvious) pattern of misconduct designed to retaliate against me for whistleblowing and/or attempt to intimidate me into dropping my whistleblower claims and withdrawing my disclosures.

18 February 2014: Mr. McAfee requests further information related to the NEON engagement via Mr. Jones. The information requested deals with NEON’s contingency fund expenditures log. I provide the requested information via email to Mr. Jones.

Mr. Quant calls me into his office again to discuss my performance. He stated that he was “tired” of my behavior and that he expected me to follow Agency policy on all issues “to the letter”. When I attempted to explain my reasoning for some of the actions he cited, he told me that there was “nothing further to discuss”, and ordered me out of his office.

Note: Again, I viewed Mr. Quant’s actions here as a continuation of the previous issues where it appeared that Mr. Quant radically changed his position on the matter after pressure from management. This incident and the ones that preceded and followed it made it clear that such pressure was being exerted by DCAA management, and that Mr. Quant had caved to it. Nevertheless, I did my best – as the information below will demonstrate – to give Mr. Quant the benefit of the doubt and cooperate with his orders, however unreasonable, to the maximum extent possible. To put it another way, I tried my utmost to be the most reasonable person in the room and accepted responsibility for wrongdoing that was either not my fault, or not wrongdoing to begin with – all with the goal of putting my behavior beyond reproach should be end up having to defend my actions formally, e.g. in a whistleblower reprisal case.
I wrote another email to Mr. Jones expressing my concerns and requesting a meeting between him, Mr. Quant and myself to resolve the issue.

19 February 2014: Mr. Jones responds and agrees that a meeting would be a good idea. He stated that he would speak to Mr. Quant on 20 February to get his perspective and then meet with both of us on 21 February to discuss the issues, and also to discuss the NEON engagement specifically. A meeting is set at 8:00 AM for the performance discussion, with the NEON discussion to follow immediately thereafter.

Mr. McAfee confirms via email that he received the contingency log documentation.

20 February 2014: Mr. Quant, Mr. Jones and myself meet to discuss the performance issue and NEON. Mr. Jones states that he is fully persuaded of the correctness of all my positions on the matter. He overrules Mr. Quant in every respect and orders:

1) The I am to be granted sick leave as requested for 11 February.

2) That I am permitted to continue to use the gliding schedule.

3) That I am to continue to contact Mr. Quant if my wife’s care delays my arrival time beyond 7:30 AM MST.

4) That I will not be required to use LWOP at any point.

5) That no medical documentation is required for either my absence on 11 February or for my wife’s condition (I had the documentation of the latter signed by my wife’s doctor in hand and offered it to both Mr. Quant and Mr. Jones).

6) That I may speak to any auditor, supervisor, or other DCAA official when needed to perform my duties, but that I am to inform Mr. Quant when appropriate and practicable.

Note: This incident marks the end of my ability to maintain a professional relationship with Mr. Quant. From this point forward it becomes rapidly clear that he is seeking faults to exploit into disciplinary action. Again, based on previous and subsequent incidents, it is clear that Mr. Quant was pressured by a person or persons in DCAA management, likely RAM McAfee and/or DRD McKune, to retaliate against me for my whistleblower disclosures related to NEON. As noted below, Mr. Quant admitted as much prior to his transfer to Lockheed Martin.

CSM formally responds to the draft SOCARs. We consider the same and are not persuaded. We document our reasoning in the working papers and that reasoning is approved by Mr. Quant and Mr. Jones.

21 February 2014: Mr. Cusworth states in an email that he is speaking to PERA about acquiring the requested information. He also asks why DCAA is questioning CSM’s pension costs now, when it has
never previously had an issue with them. He also asks what DCAA is doing about the issues at the national level, since it would appear to affect most or all public institutions of higher education.

22 February 2014: The attestation team (Jones, Quant, Vaill and McGill) meet to discuss Mr. McAfee’s email to the client. We conclude that our independence has been compromised and our judgement subordinated. We decide to request a meeting with Mr. McAfee when he travels to Denver during the week of 31 March to discuss the matter. We decide that if Mr. McAfee overrules the engagement and subordinates our judgment, we must resign rather than sign the final report, which would (at that point) become false and misleading. We document the meeting in the working papers as follows:

The FAO portion of the attestation team (McGill, Quant, Vail, and Jones – hereafter “we”) met to discuss to Engagement. We received a copy of an email between the RAM (McAfee) and the NSF-OIG (Lerner) dated 4 February 2014. The email included commentary on the DCAA Form 2000 issued by the Auditor (McGill) to the NSF-OIG (Willems) by the DCAA Office of the General Counsel provided to the RAM via electronic mail. The General Counsel commentary concluded, based solely on the DCAA Form 2000 (which was addressed to the NSF-OIG and presumed some familiarity with the facts of the case) that fraud had not occurred in the Contractor’s “Management Fee”, and that the Contractor’s use of “Management Fee” was generally allowable. However, the RAM stated to the NSF-OIG that the commentary would be included in the working papers and incorporated into the attestation opinion.

We noted the following issues with the email:

- As of the date of the email, the attestation team had not yet reached agreement as to either the Contractor’s compliance vis a via the “Management Fee”, or the overall attestation opinion. The email made it appear that we had reached such a decision, and that we would find the Contractor’s use of “Management Fees” compliant and allowable.

- As of the date of the email, there was an active and outstanding disagreement between the Field Audit Office (McGill, Quant, Vail, and Jones) and the Central Region (McAfee and McKune) on all of the SOCARs, including the “Management Fee” issue. The disagreement had not yet been dealt with according to DCAA policy as the issue had been appealed to the DRD (McKune), but no decision had yet been communicated to the FAO on any of the SOCARs. Therefore, the email appearing to express a conclusion as to that issue could, to a reasonable person, make it appear that Central Region had overruled the FAO, and that the FAO had subordinated its collective judgment to Central Region.

Note that per our conversation with the NSF-OIG on 23 May 2013 (documented above) the NSF-OIG is aware that the draft results found the Contractor in noncompliance. Therefore, the NSF-OIG would know that the email represented a change from our initial findings.
• As of the date of the email, the RAM had not provided us with a copy of the General Counsel commentary. The first time that we saw the commentary was when we were copied on the email to the NSF-OIG. Therefore, we had no opportunity to discuss the commentary within the FAO or with Central Region before the email was sent to the NSF-OIG (our client).

• DCAA policy explicitly prohibits including a DCAA Form 2000 in the attestation working papers, or the Contractor's Permanent File. As the General Counsel commentary addresses the Form 2000 at length, it too is barred from inclusion in the attestation file as including it would effectively include the Form 2000. As such, the statement in the email that the commentary would be incorporated into the attestation working papers is contrary to policy.

• The General Counsel commentary is based entirely on the DCAA Form 2000, not the attestation working papers, which contain far more detail. Also, the DCAA Form 2000 was almost a year old at the time it was considered by the General Counsel, and does not contain more recent findings reflected in the working papers. Therefore, the commentary on the Form 2000 is inapplicable to the noncompliance in the working papers because it is based on a different set of facts.

• DCAA does not have the legal authority to determine whether or not fraud occurred. That authority is vested solely in a court of competent jurisdiction. Further, DCAA does not have the authority to investigate or prosecute fraud. In this case that authority lies with the NSF-OIG and the United States Department of Justice respectively. Nevertheless, the email purports to comment upon whether or not fraud occurred and is, at best, seriously misleading to a reasonable reader insofar as it makes it appear that DCAA has the authority to make such a determination.

• We disagree with the General Counsel's conclusions insofar as they may be interpreted to apply to the “Management Fee” noncompliance. Yet the email from the RAM (the superior to Messrs. McGill, Quant, and Jones and Ms. Vail) could easily be interpreted by a reasonable person to express agreement with the General Counsel by the entire attestation team.

We identified this unilateral action by the RAM as a potential significant threat to our independence. The email contained materially false misrepresentations but was nevertheless passed on to the client (the NSF-OIG) as fact and signed by a senior management official who is effectively the reviewing partner on the Engagement. This seems to create a significant threat to our independence in both fact and appearance. We determined that further research was required to determine if an actual significant threat to our independence in either/both fact and/or appearance exists; and, if so, what safeguards we could implement
to mitigate the threat. We determined that if the threat could not be mitigated, it would likely require us to withdraw from the Engagement. Ms. Vail was assigned to perform the necessary research. We will meet again to discuss the issue in as expeditious of manner as possible once Ms. Vail’s research is completed.

(emphasis added)

24 February 2014: In response to a question sent by me via email, Mr. Cusworth confirms that CSM’s accounting system is inherently incapable of accrual basis accounting for leave. Because accrual basis accounting for leave was and is required by 2 CFR § 220 and the Generally Accepted Accounting Principles (“GAAP”, pronounced ‘gap’) of the Governmental Accounting Standards Board (“GASB”, pronounced ‘gaz-be’), this confirms that CSM is in noncompliance with that regulation as it accounts for its leave on the cash basis, and indeed its accounting system cannot even use anything other than cash basis accounting for leave.

25 February 2014: Office of Naval Research (“ONR”) contracting officer David Godfrey requests a meeting via email with DCAA and CSM to discuss the noncompliances.

Mr. Shipley also requests a (separate) meeting via email. A meeting is arranged at 10:00 AM MST. Mr. Shipley states that the pension issue was a known concern considered in the mid 1990s, but because state pension funds were pretty much all funded at the time, the concern was not pursued. He stated that now that most state pension funds were seriously underfunded, that the findings at CSM were accurate on the pension noncompliance, and likely represented a nation-wide noncompliance at most or all public institutions of higher education. He stated that there could very well have been hundreds of millions of dollars of improper payments made to public institutions of higher education that were expressly unallowable under 2 CFR § 220 because they were being assigned/applied to prior period costs.

I communicate Mr. Shipley’s comments to Mr. Quant and Mr. Jones.

26 February 2014: The ONR meeting is arranged for 12:00 PM MST. During the discussion, CSM through Mr. Cusworth and its VP of Finance substantively agree with our findings on the pension issue. Rather than arguing that our findings were incorrect, CSM instead argues that they are unfair because CSM was only following state law, and it was Colorado law that put it into noncompliance. We respond that DCAA does not determine whether or not something is “fair”, we follow the law – and the law makes the pension costs allocated to prior periods unallowable. Mr. Godfrey states that he agrees with DCAA’s position and stresses that CSM needs to provide the information from PERA so that DCAA can determine how much pension costs were unallowable and should not have been reimbursed by the Government.

4 March 2014: I previously submitted a complaint regarding the NEON engagement to DCAA’s Internal Review Directorate (“IRD”). I alleged that the audit was being improperly influenced by DCAA management, and that reprisal was actively occurring directed at me. On 4 March Ms. Sophia Blake informed me that IRD had opened an inquiry into the matter under case no. 14047CR.
5 March 2014: I participated in an intake interview with Ms. Blake and provided an overview of the NEON situation.

5 March 2014 – 7 March 2014: I provide documentation and further information related to the NEON situation to IRD, and also provide copies and further information to Mr. Jones to keep him informed of the matter.

6 March 2015: Mr. Cusworth requests on behalf of PERA via email that all DCAA personnel involved in the CSM audits sign nondisclosure agreements before PERA provides the requests pension cost information. After consultation with Mr. Quant and Mr. Jones, I respond via email and state that because DCAA is bound by 18 U.S.C. § 1905, which imposes criminal penalties for improper disclosure of contractor financial information, no nondisclosure agreement is necessary.

7 March 2015: PERA Senior Staff Attorney Jennifer K. Schreck responds via email and states that, based on my email above, PERA would not insist upon a nondisclosure agreement. She further stated that PERA would consult with Mr. Cusworth and provide the requested information shortly.

10 March 2014: IRD conducts its intake interview. Ms. Sophia Blake is the IRD investigator assigned to the case. IRD is provided with a complete overview of the NEON engagement to date.

13 March 2014: I provide IRD with a list of all DCAA personnel involved in the NEON engagement and other requested documentation.

14 March 2014: Mid-Atlantic Review completed. As to the management fee issues, Mid-Atlantic Region concludes "We don't comment on Management Fee. In the nonprofit arena, this is how the contractor pays for unallowable costs and the agencies know this to be a fact."

This is an extraordinary statement for a Government official to make. First, Mr. Baylor (the technical specialist) states that a) this is how contractors pay for unallowable costs and b) that the Government "knows this to be a fact". This is flat out stating that the Government is fully aware when it makes fee awards what the contractors/grantees will be spending those fees on (i.e. illegal costs). His instruction is to not talk about the elephant in the room -- the fact that Government officials are now colluding with grantees to defraud the taxpayer. The fact that the Office of Management and Budget determined in April 2015 that the payment of fee to cover alcohol, lobbying and parties was always improper supports this view.

18 March 2014: Mr. Cusworth provides the documentation from PERA regarding the CSM pension contributions. The information provided confirms that CSM has been charging the Government for its pension costs based on its contributions in a given year, not its funded actuarially determined costs assigned to that year as required by 2 CFR § 220. We conclude that over the past decade CSM charged the Government for millions of dollars of pension costs deemed unallowable by operation of 2 CFR § 220. Further discussions with CSM and PERA follow over the following days to clarify the information provided.
19 March 2014: IRD requests, and I provide, further documentation. I provide the Mid-Atlantic review notes above as well.

21 March 2014: DoDIG writes to me via email and states that some of my complaints have been referred within DoD for action, while others were closed for not having a ‘sufficient basis to initiate an inquiry regarding a senior official.

21 March 2014: I submit the CSM pension noncompliance to Supervisory Auditor Quant (copied to FAO Manager Jones) for review. Note: The review process takes some time, especially with the NEON engagement. A number of emails and telephone calls occur on the issue, but I have omitted mention of them from this summary as they aren’t particularly relevant, and can easily be provided upon request.

26 March 2014: A high-level meeting occurs between DCAA and NSF-OIG. Note that I did not find out about this meeting until September 2014). DCAA Deputy General Counsel David Hoffman states that there is no legal basis to pay management fees (profit) to nonprofits -- but that DoD has been doing so anyway for years. NSF-IG appears to agree to look the other way if DCAA will provide memos on the issue as cover because investigating the matter potentially opens numerous Government agencies to political backlash for paying the fees, and for the oversight agencies like DCAA and NSF-OIG for failing to stop payment of the fraudulent "fees" that have been going on for at least a decade at NSF.

14 - 28 March 2014: I prepare our response to the Mid-Atlantic review.

Note: As noted above, we are not aware that Ms. McKune has already decided to overrule us on the engagement without the Mid-Atlantic review, and that our response is, therefore, irrelevant.

31 March 2014: Mr. Jones writes to Mr. McAfee via email and requests a meeting on the NEON engagement during this week.

1 April 2014: Mr. McAfee agrees to a meeting. I complete my commentary related to the Mid-Atlantic review, and make adjustments to the SOCARs in consultation with Senior Auditor Dan Gerleve. I provide the revised SOCARs and my response to the Mid-Atlantic review to Mr. Jones, Mr. Quant and Ms. Vaill for their review and approval.

2 April 2014: Mr. McAfee meets with the attestation team (Jones, Quant, Vaill, and McGill) in Denver. Mr. Jones states that in his opinion, Mr. McAfee has created an impairment to independence by informing the client that we would conclude that no fraud had occurred at NEON when, in fact, he as engagement partner and we his subordinates had not reached that conclusion and had, as Mr. McAfee knew, reached the opposite conclusion.

Mr. McAfee stated that no impairment to independence had occurred because Ms. McKune had ‘two months earlier and prior to Mr. McAfee’s email to Ms. Lerner already decided to overrule us.

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I pointed out that such a decision in and of itself was improper – because Ms. McKune made the decision and Mr. McAfee communicated it to the client without even notifying Mr. Jones and engagement partner, or any of us on the local attestation team. Mr. Jones agreed and asked what the point of having an engagement partner (he used the DCAA term “FAO Manager”) was if senior management was just going to unilaterally modify audit reports to remove adverse findings and notify the client of what would be contained in the final audit report without even bothering to tell the engagement partner, much less actually get his authorization.

Mr. McAfee responded that Ms. McKune had every authority to do so.

I requested a copy of Ms. McKune’s decision. Mr. McAfee stated that there was no written decision, but that he could ‘get Ms. McKune on the phone’ to deliver her decision. However, he stated that the decision was final, and no reconsideration or further appeal would be afforded.

I informed Mr. McAfee that since my judgement has been entirely subordinated, substantiated audit results have been removed from an audit report over the objection of the engagement partner and his staff, and no written justification whatsoever has been provided to justify the decision, that I am required to resign from the engagement in accordance with the Code.

Mr. McAfee happily accepts my resignation and immediately turns to Mr. Jones and states: ‘are you going to refuse to sign the final report and violate DCAA policy?’ Mr. Jones, who (as noted above) had apparently been prepared to also resign from the engagement, was taken aback by the apparent threat by Mr. McAfee, and stuttered a response that he would ‘comply with DCAA policy’. As noted below, Mr. Jones ultimately signed the report, even though he documented in writing that he disagreed with the substance of the very report that he was signing.

It is worthy of note that during the course of this meeting Mr. McAfee acted in a peremptory and threatening fashion towards my person, including screaming (not merely yelling or raising of the voice) at me for not agreeing with Ms. McKune’s decision.

After the meeting, Mr. Jones decides to revise the SOCARs in response to Mr. McAfee’s (few) legitimate concerns and also the Mid-Atlantic Review (in addition to the previous revisions) so that the final SOCARs agreed to by him as engagement partner are of the best quality. The purpose for this decision was to ensure that our position was as well documented for the working papers as possible before we removed them at Ms. McKune’s order.

4 April 2014: After consultation with counsel, I conclude that notification of the NSF-IG (in her capacity as IG, not necessarily as our client) is required. I call IG Lerner and set up an appointment to discuss the matter. The purpose of the phone call is to inform her (as IG) that the report she will be receiving is, in my opinion, false and misleading. Given that submission of a false report to an inspector general is a crime (see, e.g. 18 U.S.C. § 1001), I believe I am making a disclosure of a violation of law to an inspector general in accordance with 5 U.S.C. § 2302.

After the conversation, I summarized the conversation in an email to Ms. Lerner:
Thank you for swiftly returning my call. I appreciate you taking the time to discuss the allegations of misconduct by DCAA management regarding our audit of NEON, including the allegation that DCAA management is actively suppressing unfavorable audit results. As I noted during our conversation, I recommend that the NSF-OIG request the entire working paper package once the NEON audit report is issued -- including specifically the disagreements between the Denver Branch Office and DCAA Central Region management, as relying only on the report (assuming that the report is indeed an unqualified opinion) will be, in my opinion, materially inaccurate.

4 April 2014: Mr. McAfee states in an email to Mr. Jones that he is personally preparing Mr. McKune’s decision. He states: “I am the one that has to draft the DRD's memorandum and I don't want to wait for the draft of the revised SOCAR”. Thus, Mr. McAfee admits: 1) that Ms. McKune’s decision had no written support at the time it was made in early March, nor the time it was communicated to us; 2) that Mr. McAfee is writing Ms. McKune’s decision for her, even though she was supposed to be the neutral arbiter between the engagement partner Mr. Jones and the concurring partner Mr. McAfee on their disagreement and, 3) that he would be writing said decision without even considering any revisions we would make to the SOCAR or further information that we would provide.

4 April 2014: I brief IRD on the above. I summarized my comments in an official statement to IRD investigator Sophia Blake via email as follows:

On Friday 14 April 2014, the DCAA Denver Branch Office was provided with commentary from the technical specialist at the Chesapeake Branch Office of the Mid-Atlantic Region regarding the Denver Branch Office's audit of NEON. The technical specialist review was requested by Central Region Deputy Regional Director Martha McKune in 2013. The specialist generally concurred with the Denver Branch Office's findings and conclusions in half of the SOCARs, and did not concur with the remaining half. During the remainder of March, the Denver Branch prepared its collective response to the Mid-Atlantic Review. The FAO Manager (Jones) also requested that the RAM (McAfee) justify his decision to send an email to the NSF-OIG stating that the management fee issue had been resolved and was compliant, even though at that time he was aware that the Denver Branch Office (McGill, Quant, Vail, and Jones) collectively disagreed with his conclusions and had communicated that disagreement in writing to Mr. McAfee. Mr. McAfee did not provide a response to Mr. Jones's written request for an explanation.

The Denver Branch Office (McGill, Quant, Vail and Jones) met with RAM McAfee on the afternoon of 2 April 2014 in person at the Denver Branch Office. The purpose of the meeting was to discuss the email sent by Mr. McAfee, the Denver Branch Office’s response to the Mid-Atlantic Region’s technical specialist review, and the significant revisions to the SOCARs that had been made since the initial disagreement in 2013 that Mr. McAfee needed to be aware of when deciding whether to concur with the Denver Branch Office on each SOCAR. Mr. McAfee stated that Deputy Regional Director Martha McKune had already decided to overrule the Denver Branch Office on all of the SOCARs, and that we were to

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issue a clean report with no mention of the eight separate noncompliances documented in the draft SOCAR. Mr. McAfee stated that Ms. McKune would provide her decision to the Denver Branch Office verbally over the phone (or in writing if requested), but that she had authorized Mr. McAfee to deliver her decision. The Denver Branch Office stated that there were significant revisions to the SOCARs to take into account before a final decision was made, and also asked why the SOCARs that Mid-Atlantic agreed were correct were also being removed. Mr. McAfee stated that Ms. McKune and he disagreed with all of the SOCARs and that was 'the final decision'. Mr. McAfee also stated that he and Ms. McKune had communicated at least a portion of that decision to the NSF-OIG without consulting the Denver Branch office.

The Denver Branch Office objected to the actions of Ms. McKune and Mr. McAfee and stated that it compromised our independence and objectivity by forcing us to subordinate our judgment to Mr. McAfee and Ms. McKune without written justification and also because they had notified the client of a decision when there was still an outstanding disagreement. Furthermore, since Ms. McKune has apparently made her final decision, the attestation team could not believe that any future discussion of the issues would be unbiased. Mr. McAfee stated that Ms. McKune had made the decision, she simply had not bothered to communicate that decision to the Denver Branch Office. Mr. McAfee restated the order to remove the SOCARs. Mr. Jones demanded that the order be put in writing and Mr. McGill, the lead auditor, announced his resignation from the engagement due to the fact that to do otherwise would impermissibly subordinate his (my) judgment. A copy of his (my) letter of resignation from the engagement is attached hereto. Mr. McAfee agreed to have Ms. McKune provide the order in writing.

Subsequent to the meeting, Mr. McAfee requested further details on two issues. Those two issues were already addressed in the SOCARs, which Mr. Jones communicated to Mr. McAfee. Mr. McAfee also stated that he would PERSONALLY be drafting Ms. McKune's decision, despite the fact that he was one of the parties to the disagreement (the Denver Branch Office being the other). The Denver Branch Office noted this violation of DCAA policy -- which requires that the DRD make and document the decision to break a disagreement, not the RAM. Mr. McAfee also stated in the same email that he would draft the decision without reviewing the revised SOCARs which, again, had changed significantly since the version obtained by the RAM and DRD in 2013 when the initial disagreement occurred. A copy of the email chain on this subject is also attached hereto.

This appears to be a violation of the DCAA disagreements policy, the Code of Professional Ethics of the AICPA, GAGAS, and possibly Federal criminal law (see, e.g. 18 U.S.C. § 1001) because the final audit report will be false and misleading because it does not contain the substantiated noncompliances which the Denver Branch Office was ordered to remove without written justification by the DRD. Because one of the noncompliances was also a probable instance of fraud, issuing the audit report without the findings (and after Mr. McAfee stated to the NSF-OIG that the DCAA Form 2000 issued by Mr. McGill to the NSF-OIG was incorrect, unlawfully undermining and interfering with the Form 2000) is arguably a criminal act of concealing fraud.

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On the morning of 4 April I contacted IRD investigator Sophia Blake and relayed the information above to IRD for further action.

4 April 2014: I officially resign from the audit as I believe it to be a fraudulent document now that the findings have been improperly removed. I state:

Mr. Allen Jones  
Field Audit Office Manager  
Denver Branch Office

Sir:

On 2 April 2014 the Regional Audit Manager Mr. Jerry McAfee communicated to the attestation team (McGill, Quant, Vail, and Jones) that the FAO’s position on the subject Examination had been overruled by Deputy Regional Director Martha McKune in its entirety. Mr. McAfee stated that written orders would be provided from Ms. McKune ordering the FAO to withdraw all of the draft Statement of Conditions and Recommendations forthwith.

I strongly disagree with the position of Ms. McKune and Mr. McAfee, as I have documented and communicated to you, Mr. McAfee and Ms. McKune repeatedly.

In accordance with § 102-4 of the Code of Professional Ethics of the American Institute of Certified Public Accountants (which, as a member of the AICPA and a Colorado CPA, I am required by rule and law to follow), I believe that withdraw of the SOCARs represents “knowingly misrepresenting facts or subordinating [my] judgment when performing professional services.” I further conclude that such action “fails to comply with professional standards”, “creates a material misrepresentation of fact” and “may violate applicable laws or regulations” by removing valid and material noncompliances, including allegations of fraud, from the final audit working papers and audit report.

I conclude that my professional judgment has been subordinated to Mr. McAfee and Ms. McKune. I have documented my position on all of the noncompliances in the final draft SOCAR dated 4 April 2014 which was drafted in response to the Mid-Atlantic technical specialist review. I have not received reasoning from Ms. McKune documenting the reasons for her decision to overrule the FAO, so I have been unable to respond. Mr. McAfee stated unequivocally that Ms. McKune’s decision was final and not subject to further discussion – regardless of the Mid-Atlantic review and our response to the same. Therefore, there are no further safeguards that I can put in place to protect myself from a significant subordination of judgment. As such, I conclude that I must withdraw from the Engagement to protect my professional integrity.

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Therefore, I hereby resign from DCAA’s examination of the accounting system of the National Ecological Observatory Network, Inc. effective 4 April 2014 at 5:00 PM. This will give me sufficient time to provide the working paper package to Supervisory Auditor Michael Quant for further action.

(emphasis added).

I provide the official working papers package to Mr. Quant since I have resigned.

8 April 2014: I send an email to staff for United States Senators Bennet, Coburn, Paul, McCaskill, and Grassley and disclose both the alleged wrongdoing at NEON and the NSF, and also at DCAA. I make the same disclosure to the Senate Committee on the Judiciary and the House Committee on Oversight and Governmental reform.

I inform both Mr. Jones and Mr. Quant that I have disclosed the allegations of misconduct by NEON, the NSF and DCAA to the Congress.

I also submit multiple complaints to the DoDIG Hotline over the next 12 months.

16 April 2014: The Defense Criminal Investigative Services (“DCIS”) the criminal investigative arm of DoDIG, requests an interview with me regarding NEON, apparently prompted by pressure from Senator Grassley’s office. The interview is schedule for the next day.

17 April 2014: I provide a briefing on the issues to date to DCIS Resident Agent in Charge Patrick O'Toole and DCIS Special Agent Albert M. Wiesner. I note during the briefing that the information is being provided stream-of-consciousness style and may not be complete. I also note that a large amount of information pertinent to the matter is not presently available to me, and may never be available to me. Therefore, I strongly recommend that the agents do not rely solely on the information in my possession when determining whether wrongdoing had occurred.

Early April 2014: During early April of 2014, I have several conversations with Assistant Director IRD Angela Janysek, the ‘independent’ oversight authority within DCAA. These conversations will continue until early 2015. During those conversations, Ms. Janysek stated that she was acting as intermediary between me and DCAA Director Fitzgerald and DCAA Deputy Director Bales.

Note: with the benefit of hindsight, it is now apparent that the actions of Ms. Janysek (now Inspector General Janysek-Denzler) were improper. Ms. Janysek was supposed to be the independent internal watchdog for DCAA, but in taking on the role of intermediary assumed the role of DCAA management. Given that Ms. Janysek had access to confidential inspector general materials, such as whom in the Agency I had accused of misconduct to DoDIG, her participation in the matter as management is of the gravest concern and critically compromised her ability to act as in independent watchdog then, and even more critically compromises her ability to act as an independent inspector general now. The fact that her office
has been involved in every aspect of the investigations into this matter that I am aware of brings those investigations into serious doubt and, at the very least, creates an appearance if impropriety.

17 April 2014: Ms. Janysek informs me that, at her recommendation and with her consent, DCAA Director Fitzgerald and Deputy Director Bales had agreed that the entire NEON engagement approval process would be moved to the Northeastern Region.

It is worthy of note that Ms. McKune made her decision on the fraud/noncompliance "management fee" prior to 4 February 2014 (accordingly to Mr. McAfee), and had Mr. McAfee communicated it to the NSF-OIG on that date. The Mid-Atlantic review was not received until 14 March 2014, so Ms. McKune made her decision without bothering to even look at the Mid-Atlantic review that she herself ordered in 2013. Therefore, I am unsure what the point of sending the audit for another review in another region might be -- other than to continue to delay the need for Ms. McKune to issue a written decision on the audit. It also raises the interesting possibility that there will be four different opinions -- the Denver Branch (McGill, Quant, Vail, and Jones), Mid-Atlantic Region, Northeastern Region, and Central Region (Mr. McAfee the Regional Audit Manager). No DCAA audit has been subject to review by three different regions in the history of DCAA (to the best of my knowledge). Ms. McKune would still have the final say -- and given that she has already stated her opinion on the most serious issues (the "management fee") in writing to the NSF-OIG as of 4 February, all of this sending the audit to different regions for review feels like a shell game to avoid anyone having to take responsibility for the "final" decision and/or to cover up the eventual wrongdoing (issuing the false report over the engagement partner’s written objections as to its veracity.)

Further, over my specific objections to Mr. Janysek, the Northeastern Region was provided not just with the SOCARs (which should stand on their own), but also all of Mr. McAfee and Ms. McKune’s comments, including those comments questioning our independence. Therefore, I stated to Ms. Janysek that I did not believe that the Northeastern Region review would be independent because it would be tainted by the opinions of Mr. McAfee and Ms. McKune. I stated that the SOCARs should stand on their own, and should be reviewed de novo without any other documentation, at least initially. Ms. Janysek (on behalf of Mr. Fitzgerald and Ms. Bales) refused to do so.

The Mid-Atlantic review appears to be get completely ignored, it is never mentioned again in the decision-making process regarding NEON – which certainly appears to be forum shopping on DCAA management’s part. To elaborate, Mid-Atlantic agreed with half of the SOCAR content, Northeastern Region ultimately only agreed with about 5%. Therefore, a reasonable person could conclude that DCAA management had already made up its mind as to what it wanted in the audit report, and was simply shopping around for someone “independent” to agree with them. This would explain why the Mid-Atlantic review was ignored – it did not get to the ‘right’ conclusion from DCAA management’s prospective.

18 April 2014: Mr. Jones provides the working papers to the Northeastern Region as instructed.

18 April 2014: Special Agent O’Toole states in an email
Mr. McGill, thank you for your time and effort yesterday. It was very helpful to meet with you in person and I appreciate the effort you put into your presentation. As I explained, DCIS was tasked to interview you for the purpose of clarifying the allegations and information that you have submitted to the DoDIG Hotline and other stakeholders. We are reporting that interview through appropriate DCIS channels and that concludes our role in this matter at this time. Should additional information be required, someone will contact you.

I never hear from him or anyone else at DCIS again.

22 April 2014: Mr. Quant summons me to his office and presents me with two DCAA policies, one regarding contact with the media, and the other contact with the Congress. He states that I am not to discuss anything related to either engagement with the media or Congress without permission from DCAA Headquarters.

I object to the latter part of the order as directly violating the Whistleblower Protection Enhancement Act of 2012’s prohibition on agency gag orders, and noted specifically that the policy does not contain the required disclaimer paragraph mandated by the Act. Mr. Quant stands by his order as to the media, but does not ‘officially’ order me to comply with the policy on contact with the Congress, but instead tells me that I should “keep it in mind”. I take that as the threat that I believe it was intended to be.

Therefore, I was forced to inform the Congress (a committee of which wanted me to speak to the media on the matter) that I would be unable to do so due to this order.

Interestingly, while I informed Mr. Quant and Mr. Jones that I was talking to Congress, I never mentioned to them that I even contemplated speaking to the media. Therefore, it is interesting that Mr. Quant brought up the issue – perhaps DCAA management received information from some other source.

23 April 2014: Mr. Quant sends me an email that states: “Regarding our conversation yesterday, if you are contacted by media regarding any DCAA official business, including a current or completed audit, you are to refer them to the Executive Officer, Joe Garcia”. Therefore, it appears that Mr. Quant has backed off, at least for the moment, of his order not to talk to the Congress. I fully brief the Congress on the matter and state that I had not and would not speak to the media without authorization (which was the truth).

I write to Mr. Jones via email:

I have, as you know, been in communication with various contacts in the Congress. 5 U.S.C. § 7211 expressly forbids interference in my right to provide information to the Congress as a Federal employee. The statute states:

"The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied."

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I believe that the policy on contact with Congress violates my rights under 5 U.S.C. § 7211. Therefore, I have not and will not follow DCAA policy regarding contact with Congress insofar as that policy purports to require me to clear my contact with and information provided to the Congress with DCAA Headquarters prior to submission to the Congress, and also purports to give DCAA Headquarters the ability to deny me the right to provide unclassified information to the Congress under certain circumstances (several of which appear to apply here, including providing audit information that has not gone through management review). Any attempt to enforce the DCAA policy on contact with Congress would also violate 5 U.S.C. § 2302. 5 U.S.C. § 2302(b) states:

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

[...]

implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: "These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.

The DCAA policy on contact with the Congress does not contain the required language, and specifically restricts my ability to communicate with Congress in violation of "existing statute" (i.e. 5 U.S.C. § 7211). As such, it is a "nondisclosure policy" as defined by the statute. Therefore, it is unenforceable under 5 U.S.C. § 2302(b)(13) and I will not comply with it.

25 April 2014: Mr. Jones states to me that he notified Ms. McKune and Ms. Bales that I have violated DCAA's contact with Congress policy. I write to the Congress via email and inform them of this fact.

28 April 2014: Due to new Congressional parties becoming involved, I write an email summarizing the current status of the situation:

Last week my FAO Manager Mr. Jones notified DCAA Headquarters in accordance with DCAA's policy on contact with Congress that I was providing information to the Congress. Based on comments from Central Region Deputy Regional Director McKune and DCAA
Deputy Director Bales is appears that DCAA management was already aware of Congressional interest in this case.

Apparently in response to this, responsibility for making the "final decision" as to whether to issue a clean audit report has been transferred to the DCAA Northeastern Region Deputy Regional Director Bill Adie. This is not in accordance with DCAA Policy, which delegates final authority to the Central Region Deputy Director Ms. McKune because the audit is being lead out of the Denver FAO (which is part of Central Region). You will recall that Ms. McKune, through her immediate subordinate Mr. McAfee, is the one who ordered me to remove my findings and issue a clean audit report in what was communicated to me as a "final decision". This "final decision" is what triggered my resignation from the audit, complaint to the DoD-IG, and my contact with the Congress.

It appears that the intention of this move is to retract the previous "final decision", and shift responsibility to a different region and a different deputy regional director. This appears to be a clear case of pass-the-buck -- and is also strange given that the move was made subsequent to Ms. McKune's final order being communicated to me, and my resignation from the audit. It appears that DCAA is trying to dig itself out of the hole Mr. McAfee and Ms. McKune created -- but trying to do so by further violating DCAA policy is highly questionable. Further, given that the audit was already reviewed by the Mid-Atlantic Region, an opinion from the Northeastern Region could further muddle an already complex management review trail. Mr. Jones informs me that in this two+ decades of DCAA service, he has never heard of an audit being reviewed by three different regions.

As this new direction is both perplexing and concerning, I am communicating these developments to all of you.

28 April 2014: I inform IRD Investigator Blake of these developments. Ms. Blake responded:

IRD will be looking into the allegations made against Ms. Bales and Ms. McKune.

IRD does not conduct investigations on open audits, or duplicate investigations being conducted by other entities. Therefore, IRD is not investigating the complaints regarding the open audit, and it is our understanding that you are pursuing those allegations through other channels.

28 April 2014: I respond to Ms. Blake and state:

All of the complaints to Congress, the DoD-IG, the NSF-IG, and to DCAA's Internal Review Directorate ("IRD") are all related to the same audit (NEON), which is still in progress. As such, I do not see how IRD can look into the allegations against Ms. Bales and
Ms. McKune without involving IRD in an "open audit". Further, the fact the audit is "open" is part of the problem, and someone has to have the authority to address the issue. If not IRD, who has that authority? I also note the absence of Mr. McAfee from that list with some puzzlement as he is certainly involved in this situation.

Furthermore, it is my understanding that IRD is not empowered to investigate senior officials; instead, that power lies with the Office of the General Counsel per DCAA policy. However, with the Deputy General Counsel involved already in the audit and subsequent issues, you clearly cannot go that route. I am unsure, therefore, were IRD derives its authority in this matter. Please enlighten me.

Finally, with Deputy Director Bales and Director Fitzgerald involved in the matter, I have serious questions as to whether an internal investigation is appropriate given their positions as deputy and head of DCAA respectively -- which gives them the appearance (if not the actual ability) to interfere in any internal investigation. Also, I note that the DCAA organization chart (attached hereto) shows Assistant Director Janysek (the head of IRD) as reporting to Ms. Bales and Mr. Fitzgerald. How can IRD investigate Ms. Bales (and potentially Mr. Fitzgerald) when IRD reports to Ms. Bales (and Mr. Fitzgerald)?

With all of that said, there have been two developments in NEON. Both are related to the conduct of Ms. McKune and Ms. Bales. A summary of the developments follows.

First, the audit in question has been moved to the Northeastern Region for a final decision as to the audit findings. Below is an excerpt from the latest information I have provided to the Congress:

[Excerpt from email to the Congress, 28 April 2014]

Last week my FAO Manager Mr. Jones notified DCAA Headquarters in accordance with DCAA’s policy on contact with Congress that I was providing information to the Congress. Based on comments from Central Region Deputy Regional Director McKune and DCAA Deputy Director Bales is appears that DCAA management was already aware of Congressional interest in this case.

Apparently in response to this, responsibility for making the "final decision" as to whether to issue a clean audit report has been transferred to the DCAA Northeastern Region Deputy Regional Director Bill Adie. This is not in accordance with DCAA Policy, which delegates final authority to the Central Region Deputy Director Ms. McKune because the audit is being lead out of the Denver FAO (which is part of Central Region). You will recall that Ms. McKune, through her immediate subordinate Mr. McAfee, is the one who ordered me to remove my findings and issue a clean audit report in what was communicated to me as a "final decision". This "final decision" is what triggered my resignation from the audit, complaint to [IRD,] the DoD-IG, and my contact with the Congress.

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It appears that the intention of this move is to retract the previous "final decision", and shift responsibility to a different region and a different deputy regional director. This appears to be a clear case of pass-the-buck -- and is also strange given that the move was made subsequent to Ms. McKune's final order being communicated to me, and my resignation from the audit.

Second, my attention has been directed by my FAO Manager to a DCAA and a DoD policy about contact with Congress. The DCAA policy is attached hereto, the DoD policy is at http://www.dtic.mil/whs/directives/corres/pdf/540004p.pdf. An excerpt from an email to my FAO Manager on this matter follows:

[Excerpt from email to FAO Manager Allen Jones, 23 April 2014]

I have, as you know, been in communication with various contacts in the Congress. 5 U.S.C. § 7211 expressly forbids interference in my right to provide information to the Congress as a Federal employee. The statute states:

"The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied."

I believe that the policy on contact with Congress violates my rights under 5 U.S.C. § 7211. Therefore, I have not and will not follow DCAA policy regarding contact with Congress insofar as that policy purports to require me to clear my contact with and information provided to the Congress with DCAA Headquarters prior to submission to the Congress, and also purports to give DCAA Headquarters the ability to deny me the right to provide unclassified information to the Congress under certain circumstances (several of which appear to apply here, including providing audit information that has not gone through management review). Any attempt to enforce the DCAA policy on contact with Congress would also violate 5 U.S.C. § 2302. 5 U.S.C. § 2302(b) states:

"Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

[...]

implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: "These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or
liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.”

The DCAA policy on contact with the Congress does not contain the required language, and specifically restricts my ability to communicate with Congress in violation of "existing statute" (i.e. 5 U.S.C. § 7211). As such, it is a "nondisclosure policy" as defined by the statute. Therefore, it is unenforceable under 5 U.S.C. § 2302(b)(13) and I will not comply with it.

I need to accurately document and provide to the Congress the status of IRD’s involvement in this matter. As such, please update me on where IRD is at, including addressing the concerns above, so that I can pass that information on to the Congress.

29 April 2014: Ms. Janysek calls me to discuss my concerns. I document the conversation in an email to her immediately afterwards as follows:

I appreciate your phone call this morning regarding DCAA’s audit of NEON. I agree that a meeting of the minds on this issue could be very beneficial to all involved by fostering open, complete, and honest communication between all of the parties involved with the objective of performing the best possible audit. I also concur that using a facially neutral arbiter to moderate the meeting/discussion would be very useful to fostering positive dialogue by the participants. I will be out of the office between 7 May and 13 May, but look forward to scheduling a meeting thereafter.

I do have a couple of questions/issues regarding the meeting for your consideration when you have a few moments. What format will the meeting take (e.g. telecon, videocon, in person -- etc.)? I ask because one of the issues in this audit has been the fact that getting all the pieces together is a necessarily visual exercise. I think some of the confusion has been caused by people not seeing the same documentation at the same time.

Therefore, an in-person meeting is the most desirable, followed by an electronic meeting that allows for document sharing. Also, will the meeting be strictly DCAA (internal)? I assume that is the case, but if others (DoDIG, NSF-OIG, etc.) are going to be involved please let me know. Finally, I will be making a full report to the Congress on the meeting and its outcome at the request of the various Congressional entities involved.
Therefore, it might be helpful to have some sort of official record/minutes made that we can all review and agree upon following the meeting – that will avoid having multiple versions of events circulating (which is one of the things that got us into this mess).

Ms. Janysek responded:

I am also appreciative that you were able to take the time to discuss the issues at hand. I will have a meeting with the Director at 4:00pm today and I will discuss the information you have provided. If you're available, I will give you a call tomorrow to go over what we discuss.

(emphasis added)

She further responded:

Northeastern Region will conduct their review and then all parties will come together.

I fully briefed the Congress on these developments.

29 April 2014: Based on the information provided regarding the retaliation allegations above (e.g. the timekeeping issue with Mr. Quant, ‘hair-gate’ with Mr. McKune, etc.) Senator Charles Grassley sends a letter to DCAA Director Patrick Fitzgerald as follows:
April 29, 2014

Patrick Fitzgerald
Director
Defense Contract Audit Agency
Fort Belvoir, VA 22060-6219

Dear Director Fitzgerald:

A whistleblower who has been in contact with my office has alleged that his superiors have threatened to discipline him for communicating with Congress. As you may be aware, obstructing a Congressional investigation is a crime.1 Additionally, denying or interfering with employees’ rights to furnish information to Congress is also against the law.2 Federal officials who deny or interfere with employees’ rights to furnish information to Congress are not entitled to have their salaries paid by taxpayer dollars.3 Finally, Defense Contract Audit Agency (DCAA) personnel have Constitutional rights to express their concerns to Congress under the First Amendment.

Whistleblowers are some of the most patriotic people I know—men and women who labor, often anonymously, to let Congress and the American people know when the Government isn’t working so we can fix it. As such, it would be prudent for you to remind DCAA management about the value of protected disclosures to Congress and/or Inspectors General in accordance with the whistleblower protection laws. Absent such a clear communication from you, DCAA management might be able to intimidate whistleblowers to prevent them from providing information to Congress.

DCAA employees have the right to talk to Congress and to provide Congress with information free and clear of agency interference. Further, these employees have the right to be free from fear of retaliation or reprisal for doing so. Please ensure that DCAA employees are


2 5 U.S.C. § 7211 states: “The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.”

3 P.L. 113-6, § 713 states:

No part of any appropriation contained in this Act or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who . . . prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress . . . or . . . disciplines . . . any other officer or employee of the Federal Government, or attempts or threatens to commit any of the foregoing actions . . . by reason of any communication or contact of such other officer or employee with any Member, committee, or subcommittee of the Congress[.]
30 April 2014: Ms. Janysek calls me to discuss Senator Grassley’s concerns, and also some of my own related to objectivity issues with the Northeastern Region review. I documented the conversation in an email to her immediately afterwards as follows:

Per our conversation from this morning, it is my understanding that:

1) The Director, DCAA has agreed that the audit working papers for the NEON engagement are to be sent directly from the Denver Branch Office to the Northeastern Region, which will conduct an independent review of the audit working papers, findings, and conclusions. Ms. McKune has communicated this directive to Denver Branch Office Manager Jones via electronic mail.

2) DCAA's Office of the General Counsel ("Legal") is reviewing DCAA's contact with Congress policy to determine whether the policy needs to be updated and/or clarified to (a) comply with the Whistleblower Protection Enhancement Act and (b) state that the policy only applies with DCAA is contacted by Congress unsolicited, not when a DCAA employee contacts the Congress in which case the employee is free to provide Congress with any information allowed by rule and law.

3) Careful consideration needs to be given to the continued participation of Ms. Bales, Ms. McKune and Mr. McAfee in the audit given that they all stand accused of misconduct. I stated that I felt that it would be appropriate to recuse all three individuals from further participation in the audit pending the outcome of the DoDIG and Congressional inquiries, as their continued participation has the appearance of impropriety.
given the accusations against them -- and that this appearance exists regardless of whether the accusations are substantiated. You stated that you would take this concern under advisement.

4) The Director, DCAA will consider whether it is appropriate to 'sanitize' the NEON working papers, as I have suggested, to remove any reference to the disagreement and subsequent administrative history of the audit. The purpose of this action is to remove any information in the file by any party that would serve to prejudice the Northeastern Region review. Specific items mentioned as potentially prejudicial include my letter of resignation from the audit, documentation of the conversations with Ms. McKune and Ms. Bales that lead to the instant complaints, documentation of the Mid-Atlantic Region review and the Denver Branch's response to that review, and documentation of Mr. McAfee's review and disagreement with the Denver Branch -- and the Denver Branch's responses to Mr. McAfee. All of these items are administrative in nature, and are not necessary to make a determination on the efficacy of the audit. Rather, by removing the items, Northeastern Region could make their determination based on the facts of the audit alone, untainted by any administrative issues. I proposed IRD as the appropriate body to perform the 'sanitize'. You stated that you generally agreed with this premise, and would propose it to the Director. I stated that if the Director concurred, notice would need to be provided to the Denver Branch Office and Central Region so that nothing was sent to Northeastern Region until IRD completed the 'sanitize'. I further stated that if anything had already been sent to Northeastern Region, then said Region needed to be instructed to disregard it. Finally, I stated that if Northeastern Region had already read prejudicial material, then consideration should be given to moving the entire review to another Region not previously involved and effectively try again from the beginning. You stated that you would take this suggestion under advisement when discussing the matter with the Director.

5) You asked whether I felt that I had been threatened related to my whistleblowing activity with the Congress. I stated that I did not feel threatened related to my whistleblowing [note: this was referring only to Mr. Jones] and had already reported this fact to the Congress. However, I stated that I did feel the actions of Ms. McKune and Ms. Bales as documented in the audit working papers and communicated to IRD, DoDIG, and the Congress did constitute threats to 'back off' the NEON findings lest unspecified negative employment action be taken against me. I also stated that I felt that the actions of Mr. McAfee in ordering the Denver Branch Office to remove all negative findings from the NEON audit report, purportedly on behalf of Ms. McKune, to be misconduct of the highest order. Finally, I stated that the contact with Congress policy could be interpreted as interfering in whistleblowing and could put DCAA employees in a 'Catch-22' situation wherein they either violate the policy or blow their anonymity -- a situation that I stated would lead to many employees not reporting the matter to the Congress at all.

After our conversation, I spoke to my supervisor Mr. Quant and my FAO Manager Mr. Jones. Both expressed deep and serious concern over the fact that they are hearing most of the information related to NEON directly from me, rather than through the chain of

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command. They were both very concerned that they are effectively relying on the accuracy of my statements when making decisions, and stated that they need clarification on the situation through the proper chain of command in order to continue to permit me to cooperate with the various inquiries regarding NEON. Mr. Quant stated that he did not feel that it was appropriate for me to spend any official working time on this matter, especially and specifically the time being spent supporting Congressional inquiries, without specific authorization from DCAA management. I understand their concern, and stated that I would pass them on to you for consideration and possible action by Headquarters. Right now the only evidence they have that a Congressional inquiry is even underway is my word, and some clarification that (a) there is an inquiry and (b) that I am authorized to spend official time supporting said inquiry and related inquiries (IRD, DoDIG, etc.) is necessary. Otherwise they are both going to be very unhappy with me, an added complication to an already volatile situation that I think is best avoided. [Note: The official time issue will become a reoccurring theme as DCAA management appears to use restrictions on official time to prevent DCAA employees (me in particular) from making disclosures of wrongdoing, knowing full well that we are prohibited from working on Government business on our own time.

If you have any other questions or concerns in this matter, please do not hesitate to contact me. Otherwise, I look forward from hearing from you regarding issue the third (participation by accused officials in the audit going forward), issue the fourth (‘sanitizing’ the audit file), and the issue immediately above (chain of command/official time).

(emphasis added)

30 April 2014: Ms. Janysek calls me again to discuss the email above. She stated that the Director refused to follow her recommendations. I documented the conversation in an email to her immediately afterwards as follows:

Per our second conversation from this morning, it is my understanding that:

1) The Director, DCAA has ordered that the SOCARs for the NEON engagement are to be sent directly from the Denver Branch Office to the Northeastern Region along with RAM McAfee's arguments against the Denver Branch Office's position. The Northeastern Region will conduct a review of the SOCARs, taking into account Central Region's (McAfee/McKune) arguments against them. Ms. McKune has communicated this directive to Denver Branch Office Manager Jones via telephone.

This is a substantive change from my recommendation in our prior conversation and email that the review be conducted entirely independent of any arguments by either side beyond the factual audit working papers.

I stated to you that I had serious reservations about this plan because (a) Mr. McAfee, Ms. Bales and Ms. McKune are still involved in the audit despite standing accused of misconduct, leading to at least the appearance of impropriety -- especially given that they are

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aware that it was I that accused them; (b) Central Region’s arguments against the Denver ranch Office's position have not been communicated to the Denver Branch Office -- meaning that we have not had the chance to even see them, much less respond to them -- which raises serious questions about the propriety of the review process ... I note that Central Region HAS seen the Denver Branch Office's latest arguments; (c) the Northeastern Region review will not be independent because they will have Central Region's opinions in front of them at the time that they are reviewing the SOCARs, meaning that they will be influenced, at least in appearance, by information outside of the audit itself in violation of Generally Accepted Government Auditing Standards which require that an audit be judged solely on the basis of the contents of the audit working papers without any outside information -- this problem is exacerbated by the fact that the Denver Branch Office has not seen the latest Central Region arguments (as noted above) so Northeastern Region will not have the benefit of our rebuttal to (or potentially agreement with) those arguments when making its decision. **I therefore conclude that the Northeastern Region review is likely to be improper due to at least the appearance of undue influence by these individuals and a lack of balance in the information they will receive** (i.e. they will get Central Region's arguments, but not the Denver Branch Office's).

2) Ms. McKune, Ms. Bales, and Mr. McAfee will continue to be involved in the audit and will not be removed pending the outcome of any DoDIG and/or Congressional investigation of their conduct. I stated to you that as long as those three individuals continued to have official power over the audit, then I could not legally or ethically be involved in the audit given that I have accused all three individuals of misconduct and that they are aware of those accusation. This was the reason for my resignation from the audit. I further stated that I felt that continuing to allow these individuals to influence the audit was grossly inappropriate and created a clear and present danger of an appearance of impropriety, regardless of the veracity of the accusations against them as the appearance of impropriety and a lack of independence exists even if the accusations against them are not substantiated. I continue to assert that the proper course of action is to remove those individuals from any influence over the audit until such time as all inquiries into their conduct are completed and they are cleared of any wrongdoing.

3) Someone at Central Region or Headquarters will provide FAO Manager Jones with authorization for me to spend official time supporting inquiries from IRD, DoDIG, and the Congress and will specify to what charge code I should bill that time. This will ensure that my ability to cooperate with any investigations and to continue to provide information to the Congress is not interfered with or denied.

(emphasis added).

1 May 2014: DCAA management appeared to be particularly concerned regarding the contact with Congress policy and the Grassley letter, which wasn’t really directed at that tissue. I therefore clarified in an email to Mr. Jones, Mr. Quant, Ms. Janysek and Mr. Fitzgerald:

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I have reviewed the letter sent by Senator Grassley's office to the Director, DCAA on my behalf. I have attached a copy of said letter hereto. The letter states that I (the whistleblower") have been the subject of retaliation by my "superiors". In my email of 23 April to my FAO Manager, upon which you were copied, stated that my attention had been drawn to DCAA Regulation 5030.16 "Supporting Congressional Requests for Information" and DoD Directive 5400.04; I stated that said policy was unlawful under 5 U.S.C.§ 7211 and 5 U.S.C. § 2302 insofar as the policies purported to require me to report any inquiries by the Congress to Central Region, DCAA and that any requests for information from the Congress had to be approved and distributed by Headquarters, DCAA. Therefore, I stated that I would not comply with the policy and would continue to deal directly with the Congress.

Moreover, in subsequent discussions with you on this topic, specifically my email of 25 April, I specifically stated that no one had actually attempted to enforce the policy, but that I would inform you if someone attempted to do so at any point. My FAO Manager did inform his superiors in accordance with the policy that I had been in contact with the Congress, but no reasonable person could interpret the mere act of passing that information up the chain of command to be a threat of discipline. Rather, it is the EXISTENCE of the DoD and DCAA POLICIES that are the threat, not the actions of a particular superior or superiors. As I noted in subsequent conversations with you, I felt that the existence of the policy would dissuade many DoD employees from contacting the Congress lest they either violate the policy, or be forced to notify their superiors that they are contacting the Congress and allow those same superiors (who may be the subject of the protected disclosure to Congress) have final say on what information is released to the Congress. This would have a profound chilling effect upon the willingness of employees to contact the Congress and would also allow DoD and/or DCAA Headquarters to potentially sanitize any communication by DCAA employees with the Congress. Therefore, I stated that the policies must either be revised, or withdrawn.

However, the subject letter does not mention the policies. Rather, it refers to my "superiors" as having threatened me. As every person involved in this situation is my superior, each one who saw the letter quite naturally assumed that the letter was referring to him or her personally. This has caused a great deal of confusion and hurt feelings at DCAA because individuals who have in no way attempted to retaliate against met or, indeed, have actively supported me in this matter now believe that I have stabbed them in the back. Needless to say, that is an undesirable outcome.

Therefore, I request that Senator Grassley's office clarify that the letter was meant to refer specifically to the DCAA and DoD policies, and make it clear that such policies are unlawful and must be modified to comply with the law, or withdrawn. Such clarification should also state that no retaliation [by Mr. Jones or Mr Quant] is alleged to have occurred to date, but may certainly mention that should such retaliation occur in the future it would be unlawful and taken with the utmost seriousness by the Senator. This should significantly clarify matters.
5 May 2014: Mr. Jones requests via email that I respond to Mr. McAfee’s comments to the Northeastern Region. Although I had resigned, Mr. Jones stated that because all of the issues predated my resignation, seeking my response was appropriate. I agreed, limited to “a draft response to [Mr. McAfee’s position] based on information and conclusions obtained prior to my resignation for the current audit team”.

Mr. Jones stated in the email that Ms. McKune demanded a response ‘immediately’, and requested that I have the response prepared in 24 hours. I agreed to do so.

6 May 2014: DCAA management appoints Ms. Diana Graff to be the new Central Region Director. This relegates Ms. McKune to second in command of the Region, since she was effectively the ranking officer following the retirement of Mr. Carr. I send an email to Ms. Graff outlining the NEON situation, and specifically discussing the ongoing investigations and inquiries prompted by my whistleblowing.

8 May 2014: I complete my review of the Mr. McAfee’s comments to the Northeastern Region. In the document in question, Mr. McAfee states:

The FAO auditor appears to have determined NSF’s guidance is incorrect (I believe primarily based on information provided by the NSF-OIG). Further, I believe the auditor acting on that information has compromised his independence during the conduct of this audit.

I write to Ms. Janysek in an email and state:

Attached hereto is the response of Central Region through Mr. McAfee to the SOCARs. I am extremely concerned by the fact that the RAM Mr. McAfee repeatedly accuses me of a lack of independence and basically bowing to the NSF-OIG and compromising myself in fact and appearance.

As you know, a deliberate lack of independence (i.e. deliberately ignoring and failing to disclose a known conflict of interest) is grounds for dismissal from DCAA and Federal service. Therefore, I view this as a threat of negative employment action documented repeatedly in an official government document. The RAM basically states that my cooperation with the NSF-OIG investigation of NEON compromised my independence. While the punishment is not stated, it is well known to all auditors based on rule and law that the punishment for a deliberate lack of independence is termination. Therefore, I have reported to the Congress that I have been accused of improper conduct related to the audit of NEON with an implicit threat of employment action. I have also reported that my cooperation in an IG investigation is being cited as improper.

I therefore withdraw my previous commentary regarding the whistleblower letter from Senator Grassley -- that letter now accurately states that a superior has threatened me with employment action regarding my cooperation with a Congressional investigation (in this case...
the NSF-OIG investigation of NEON requested by the Congress that lead to the audit). I have informed the Congress that I […] now concur with the letter.

I further communicate this matter to you in your official capacity. Such an accusation must be investigated to determine whether I was in fact not independent, or if Mr. McAfee has made false accusations -- a very serious matter. Mr. McAfee is not an SES and is therefore within your jurisdiction. I therefore request an investigation into Mr. McAfee’s statements, and I also request that you provide this information to DoD-IG for consideration in their own investigations. I believe that Mr. McAfee must be removed from any management authority over me immediately, due to the appearance of impropriety related to a threat of prohibited personal practices under the Whistleblower Protection Act and other rule and law.

I then send an email to Mr. Jones containing my draft comments, and state:

We need to discuss this document tomorrow as Jerry throws around some very serious accusations related to my independence that I consider to be a threat of negative employment action in retaliation for cooperation with the NSF-OIG investigation of NEON.

At bottom, Mr. McAfee’s unfounded allegations are extremely concerning. The fact that DCAA never attempted to actually take action related to my independence strongly suggests that the allegations were entirely false. Further, based on my disclosure of 20 April 2015 regarding the apparent lack of independence of DCAA as a firm, perhaps that Agency was concerned that raising an independence issue was not the smartest thing to do when serious questions exists regarding its own independence.

9 May 2014: Ms. Janysek requests a telecon. I document the discussion in an email to her immediately after the conversation as follows:

Per our conversation of this morning, I expressed grave concerns regarding the NEON audit resolution process.

In the documentation I provided you on the 8th instant, Regional Audit Manager Jerry McAfee made a direct statement that I as the lead auditor on the NEON engagement had been compromised by the NSF-OIG, biased against the NSF, and that I was therefore not independent (see “RAM Position, Page 17, end of first paragraph, attached hereto).

As I have previously related to you, Deputy Regional Director Martha McKune stated (paragraphing) that ‘if anyone thinks we’re auditing the NSF, then they are not acting independently and there will be consequences’ (see attached). Ms. McKune made it quite clear that any audit finding which implicated the NSF would be punished with disciplinary action for a lack of independence. Therefore, when Mr. McAfee made essentially the same statement, but stated that a lack of independence did in fact exist (a step beyond Ms. McKune’s threat of what would happen IF it existed) – he was directly accusing me of a

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deliberate lack of independence on this audit (given that I could not be accidentally compromised under these circumstances).

Combined with Ms. McKune’s earlier statements, I view this as a direct threat of disciplinary action because my audit conclusions were that NEON violated the governing rule and law – which implicitly implies that the NSF policies (which NEON follows) are also noncompliant. The only way to avoid what Mr. McAfee views as a lack of independence is to agree with the NSF policies and allow NEON to continue its current practices – which Mr. McAfee explicitly states is what the FAO should have done in several places in the document.

At bottom, Ms. McKune stated last year that disciplinary action would be taken against anyone who ‘audits the NSF’. Mr. McAfee is now accusing me of ‘auditing the NSF’ as a patsy of the NSF-OIG. I take this a direct threat against me in my professional capacity as an auditor and employee of the United States Federal Government. While no actual disciplinary action has been taken, I take the threat of such action in future by two individuals who are my superiors very seriously.

Therefore, the following must occur:

1) There must be an immediate investigation into the accusations. If true that I deliberately allowed myself to be compromised by the NSF-OIG, appropriate disciplinary action should be taken against me. If untrue, the accusation must be withdrawn in writing by a superior of both Ms. McKune and Mr. McAfee to remove the allegations against my professional ethics, and appropriate disciplinary action taken. [Note: as far as I am aware, no such investigation has ever occurred]

2) Mr. McAfee and Ms. McKune must be immediately removed from the audit team for NEON by their superiors. Regardless of whether their accusations are true, they have so colored their professional judgment so as to make further involvement untenable. This is the same reason that I removed myself from the audit. [Note: Mr. McAfee and Ms. McKune were both permitted to remain on the attestation team]

3) Consideration should be given as to whether the NEON audit is sustainable going forward. At the very least, the statements by Mr. McAfee to Northeastern Region regarding my alleged lack of independence are so serious an accusation that they cannot help but color Northeastern Region’s evaluation. As such, that evaluation is no longer valid as the process has been irretrievably poisoned by the accusations of Mr. McAfee. Northeastern Region cannot help but read all of the audit findings that I prepared through the lens of the allegation of a lack of independence. Again, this applies regardless of whether the accusations are true. If the audit review is to take place, it will have to involve officials who are not aware of Mr. McAfee’s accusations or, arguably, or any of the administrative issues. [Note: none of these suggestions were heeded. Mr. McAfee and Ms. McKune]
participated in every aspect of the NEON engagement “resolution” at the Northeastern Region]

I understand that you will be communicating this information to the Director, DCAA today – and I look forward to his response.

Finally, I noted that I have come across disturbing information related to the “management fee” at issue in the NEON audit. As it turns out, the Department of Defense also awards “management fee” to nonprofits, and that fee is then used to pay unallowable cost with the full knowledge and indeed explicit consent of the DoD grant/contracting officers. Both Mr. McAfee (in the attached) and Mid-Atlantic Region (in their review) stated this as a fact. Needless to say, not only is this very concerning that DoD appears to also colluding with contractors to evade the legal prohibition against the payment of unallowable costs set down by the Congress, but it also seriously calls into questions whether the alleged cover-up of the NEON audit findings by DCAA management was in fact an attempt to bury the issue and avoid an investigation of NSF by the IG or the Congress that could easily have been triggered by the original audit findings.

If such an investigation confirmed the allegations against the NSF and NEON, a Government-wide investigation would no doubt be undertaken – and such an investigation would ultimately reveal that DoD and other Government departments/agencies also pay these “management fees” and, thus, unallowable costs – flat out disregarding the law. This is a very serious possibility that must be addressed – especially given the allegations of improper conduct already on the table.

I look forward to discussing this matter further with you going forward.

(emphasis added)

Note: This is the first time that a rational explanation for the actions of senior DCAA management had come to my attention. Prior to this point, I could not for the life of me figure out what DoD's (and, thereby DCAA’s) dog was in the NEON ‘fight’. However, the explanation above makes sense. Our report calls into question the practice of paying management fees to nonprofits to spend on unallowable costs. The Department of Defense appears to pay more management fees to nonprofits (primarily Federally Funded Research and Development Centers) than the rest of the Federal Government put together. Therefore, our report would implicate DoD management in the same wrongdoing we were accusing NSF management of perpetrating. Therefore, DoD management had every reason to make those audit findings go away. As noted in my referral of 20 April 2015, DCAA is not independent of DoD because (amongst other reasons) the DCAA Director is unilaterally appointed and removed by DoD management. Therefore, DoD management had both the motive and the means to tamper with the audit – and this provides a reasonable
explanation as to why senior DCAA management went to so much trouble at the highest level of the Agency to remove the findings related to the management fee from the final report.

12 May 2014: I write an email to Assistant Director Janysek and state:

A couple of things worthy of your attention to start the week:

First, I will be briefing staff for the Subcommittee on Financial and Contracting Oversight this Wednesday at 11:30 AM Mountain Time. This is the first formal briefing for that subcommittee (prior briefings have been through Senator Claire McCaskill's private office rather than through the whole subcommittee). I would like this initial briefing to contain the most up-to-date information as of that date, so I would appreciate an update on where we (especially Headquarters and the Director) stand on the subject issue prior to that time. I will also be briefing a different group of Judiciary Committee investigators than those I've been dealing with prior to this date sometime this week as well. It appears they are opening separate but related investigations into the different facets of the NEON situation. Again, I would like to ensure that I am providing them with the most accurate information available as of this week.

Second, I spoke to my FAO Manager Allen Jones late Friday and it is my understanding that he informed Northeastern Region that he would not be sending them the FAO's response to the Central Region argument against the FAO until he and Supervisory Auditor Michael Quant had more time this week to review them and formulate a complete response. He also stated to me that he too had serious concerns regarding the accusation of a lack of independence directed towards me by Regional Audit Manager Jerry McAfee in that document, and wished to discuss those further upon my concerns. He finally concurred with my concerns regarding the false statements made by Mr. McAfee regarding information not being provided to Central Region management that was demonstrably provided to Mr. McAfee and Ms. McKune.

Third, I sent an email this morning to the new Central Region Director Diana Graff requesting to speak to her about the NEON situation. Director Graff's recent background is in internal audit/internal review at DCMA (basically your job I believe), so I felt that she would be an excellent person to read in on the NEON issue -- perhaps she can help to resolve the matter before it does any more damage to the Agency's already fragile professional reputation.

Ms. Janysek asks to speak to me on the matter. I schedule a conversation for 13 May.

13 May 2014: I speak to Assistant Director Janysek, and document the conversation in an email to her immediately after the conversation (although I do not sent it until 14 May).

14 May 2014: I send the email referenced immediately above to Ms. Janysek and state:

First, the Northeastern Region now has the NEON audit working papers, the Central Region position against the position in those working papers, and the FAO's rebuttal.
Northeastern Region will conduct an "independent review" of the same forthwith and will be prepared to report back shortly.

Second, after the Northeastern Region completes its review, a meeting will be held physically in Denver involving most or all of the parties involved (Headquarters, Northeastern Region, Central Region, Mid-Atlantic Region, and the Denver Branch Office). A definitive date, time, location and list of attendees will be provided prior to the meeting. The Director shall make the final decision on the NEON audit findings.

Third, the DCAA Internal Review Directorate is not actively investigating any matters related to the NEON engagement per the instructions of the DoDIG. All open investigations regarding NEON are on hold. Rather, you are personally working directly on resolving the outstanding audit issues and the open disagreement. If the DoDIG requests IRD assistance, you would then also be performing your investigatory function at that time to the extent requested by DoDIG.

Fourth, Ms. McKune and Mr. McAfee continue to be actively involved in the audit despite the allegations against them and my prior statements that such involvement is inappropriate given the seriousness of the allegations against them. I take it that my request that they be removed from active involvement in the audit until the allegations against them are resolved (one way or another) as [being] rejected by the Director. I note here that these two individuals have been permitted to influence the Northeastern Region "independent review" by submitting written commentary questioning my independence, professional competence, and personal & professional integrity directly to Northeastern Region. They will also be involved in making the second 'final' decision. I assert again there that their continued involvement in this audit is totally inappropriate given the seriousness of the allegations against them. Regardless of the actual efficacy of the allegations, there is at least a material appearance of impropriety in their continued involvement.

Fifth, I take it that my point that the involvement of Ms. McKune and Mr. McAfee and the viewing of their prejudicial statements regarding the audit by Northeastern Region has compromised the independence of that review was not well taken. I again note that the fact that Northeastern Region is supposed to conduct an "independent review" is compromised when they are told by my superiors Ms. McKune and Mr. McAfee that I am corrupt (based on repeated verbal and written statements by them, including in the Central Region response to the SOCAR's, that I am not independent of the NSF-OIG) and incompetent (based on written statements in the Central Region response to the SOCARs that I have insufficient skills and training to perform work on nonprofits). Again, these false and malicious statements by Ms. McKune and Mr. McAfee compromise the "independent review" by materially affecting the level of credence that Northeastern Region will give to the work I have performed on the audit.

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Sixth, I also note that the implicit threat of disciplinary action that would result if I truly were corrupt and/or incompetence has not been adequately addressed. You stated on Friday 9 May in our telephone conversation of that date that the "independence issue" would not be a deciding factor in the audit determination. However, I have not been provided any written documentation of that assertion, nor have the false accusations by Ms. McKune and Mr. McAfee regarding my independence, professional competence, and personal & professional integrity been withdrawn. Therefore, I am still being threatened by Ms. McKune and Mr. McAfee related to my work on this engagement. The message from Central Region was clearly stated -- any audit findings that implicate the NSF in any wrongdoing will lead to disciplinary action towards me. I reiterate that such a message is a clear threat of a prohibited personnel practice for cooperation with the Congressionally ordered NSF-OIG investigation of NEON and must be immediately withdrawn. If the message received by me was not that intended by Central Region, then Central Region should issue written clarification of that matter forthwith. Otherwise, I continue to believe based on Central Region's written response to the NEON SOCARs coupled with prior verbal statement by Ms. McKune and Mr. McAfee that I am being threatened into issuing a clean opinion on NEON. The fact that precisely what "disciplinary action" that would occur has not been specifically stated is irrelevant -- what is clear is that the gauntlet has been thrown down, threats have been made towards me, and those must be addressed immediately. Even the appearance of a threat at this point, given the allegations against the individuals so accused, is simply unacceptable. I have repeatedly brought this issue to the attention of DCAA Headquarters, including the Director Mr. Fitzgerald, over the past six months -- and so far nothing has been done to retract and/or clarify the prior threatening statements by Ms. McKune and Mr. McAfee and they continue to exercise supervisory authority over me and my immediate superiors. They also, as I noted above, continue to be involved in this audit. Does DCAA Headquarters plan to simply continue to allow Ms. McKune and Mr. McAfee's vague threats to remain in the record, or will some adult supervision be provided and those threats (however nonspecific) be explicitly retracted or disavowed Headquarters?

Seventh, I noted that I had communicated a desire to discuss the NEON issue to the new Central Region Director Diana Graff via electronic mail so that she could work to address the issues involving her immediate subordinate Ms. McKune and Ms. McKune's subordinate Mr. McAfee. I have not to date received a response to my request from Director Graff, although I do have an email receipt showing that she read the email on Monday.

(emphasis added)

To the best of my knowledge, neither Ms. Janysek nor anyone else at DCAA ever respond to or take any action to address these concerns.

14 May 2014: Mr. Bob McKinney, an auditor at the DCAA Penn State University Sub-Office contacts me via mail and states: “I was told by David Godfrey of ONR that you are questioning the portion of state retirement contributions applicable to prior year unfunded liability. He also said your report is in management review. We have the same situation at Penn State. Can you send me your report language on

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this issue, so to be consistent within DCAA, we can use your or similar language.” This appears to confirm that the retirement cost issue is not isolated to CSM. Further, when DCAA management eventually overrules the CSM findings on the pension costs, it presumably also overruled the Penn State Sub-Office, which agreed with our position on the matter. This would support an allegation of a systematic cover-up of wrongdoing by public institutions of higher education with underfunded pension plans by DCAA management, rather than an isolated incident.

14 May 2014: Ms. Janysek responds to my email above and states:

I have read through your notes regarding our telephone conversation of 13 May, and would like to clarify/reiterate a couple of points you made. Regarding your fourth point that "Ms. McKune and Mr. McAfee continue to be actively involved in the audit despite the allegations against them and my prior statements that such involvement is inappropriate given the seriousness of the allegations against them”. I would like to state that Ms. McKune and Mr. McAfee are not actively involved in the audit and have not been actively involved since the decision was made to have Northeastern Region conduct an "independent review".

Regarding your sixth point discussing the telephone conversation between you and I on Friday 9 May, I stated that I had spoken with the Director and that he said that the "independence issue" would not be a deciding factor in the audit determination. I would like to reiterate that the Director is adamant that the "independence issue" will not be a deciding factor in the audit determination.

(emphasis added)

I respond in turn and state:

I am confused. You state below that "Ms. McKune and Mr. McAfee are not actively involved in the audit and have not been actively involved since the decision was made to have Northeastern Region conduct an 'independent review'". However, the document sent from Central Region to the Northeastern Region stating the objections that Central Region management had to the Denver Branch Office’s audit findings in the subject audit was written by Mr. McAfee, with the approval of Ms. McKune. That same document not only disagrees with all of the audit findings, it also states that I am not independent & that I have sold out to the NSF-OIG, and also questions my professional competence (knowledge, skills and experience) to even conduct the audit in the first place. You have also repeatedly stated to me that you have personally spoken to Ms. McKune about the audit and how the related issues would be resolved. I also know for a fact that my FAO Manager Mr. Jones has been contacted by Ms. McKune and instructed to take action related to the audit -- again, quite recently. [Note: Ms. McKune and Mr. McAfee were both present at the final Northeastern Region decision and from all appearances were actively involved in the audit in direct contradiction to Ms. Janysek’s statements. Further, both were actively involved in, and indeed were the decision makers on the CSM audits]
Therefore, I cannot reconcile this incontrovertible act of participation in the audit process with your statement below that no such participation has occurred, or will occur. Providing their opinion on the efficacy of the audit findings in writing is material and active participation in the audit all by itself. Clearly, Mr. McAfee and Ms. McKune have been and continue to be involved with the audit despite the allegations of misconduct against them and the statement to the contrary below. Please clarify.

Second, you state (as you have indeed stated previously) that the "independence issue' will not be a deciding factor in the audit determination". However, stating it will not be a deciding factor in the audit determination in no way addresses most of my point; to wit, that the accusation is false, malicious, damaging to my professional reputation, improperly calls into question the efficacy of the audit findings that I prepared, biases the Northeastern Region review, and is at best an implicit threat of disciplinary action. If the independence claim by Mr. McAfee and Ms. McKune is false, then someone their superior needs to state so. If it is actually true (which I obviously dispute), then it MUST be a deciding factor in the audit. Ignoring the accusation is not an option -- it needs to be addressed ... one way or another.

(emphasis added)

Thereafter I received a call from Central Region Director Diana Graff to discuss my concerns. I responded immediately afterwards with an email to document the conversation as follows:

I appreciate you taking the time today to discuss the subject issue with you on the phone. Per our conversation of 14 May, I understand that you are going to review the documentation related to the NEON engagement available at Central Region, discuss the issue with the Director/Deputy Director and determine what action, if any, you need to take as the Central Region Director going forward. I look forward to your thoughts at that time.

16 May 2014: Despite my request to the contrary, Mr. McAfee and Ms. McKune both remain assigned to my chain of command overseeing the engagement partner Mr. Jones on the CSM engagements. Mr. McAfee states in an email that he disagrees with the findings related to the pension costs, but declines to provide any written justification. Mr. Jones appeals to Ms. McKune, who orders him to work with the Policy Directorate at DCAA Headquarters and Regional Special Programs (“RST”) to resolve the situation.

At about the same time, Office of Naval Research Contracting Officer David Godfrey (who, as you will recall from above, agreed with Mr. Jones and the DBO team regarding the pension noncompliance) was relieved of his duties and sent to Afghanistan. He was replaced by ONR Contracting Officer Linda Shipp.

20 May 2014: Mr. McAfee calls me to discuss the CSM engagements. I send an email to Mr. Quant and Mr. Jones immediately after the conversation to document the conversation as follows:
Jerry called me at 8:00 am this morning to discuss CSM. He stated that he felt we did not get sufficient information from PERA to support our position. He argued that we do not really know how much of the payments made by CSM in a given year are actually unallowable, because certain prior-period contributions could be allowable to fund plan losses and other non-funding portions of the UAAL. Effectively, he agrees that there are unallowable costs but does not think that they are equal to the prior-period figures provided by PERA. I find nothing in the law to justify this position, as the regulation is concerned with cash payments being made to prior years – it does not appear to be concerned with the reason for those prior-period allocations – merely that they exist. Jerry wants us to go to PERA and get a written statement of how much they interpret to be unallowable under the regulation. I told him I would talk to the two of you and someone would let him know how the FAO will proceed.

On one hand, Jerry's position makes no sense. We already have a written statement from PERA of how much cost was allocated to prior years – which is all we need under the regulation. On the other hand, if PERA is willing (and they might be) to commit to writing the same information but using the term "unallowable" in addition to "prior period" (e.g. 'unallowable prior period costs'), then we would satisfy Jerry without having to perform a great deal more work. I am more than willing to get ahold of PERA to discuss the possibility of pursuing that angle if you both think it is worth trying.

Please let me know how you want me to proceed.

Mr. Quant responded:

I just talked to Jerry about this. I expressed my opinion that we should not be asking PERA, a third party, to interpret a regulation and provide an opinion as to what is allowable and unallowable. He said he thinks that what we wrote in the report is not what PERA was saying, as documented in our workpapers.

He specifically wants PERA to agree that the costs we took exception to are costs assigned to prior years but are paid for with current year contributions. I think what he is essentially looking for is for PERA to confirm our conclusion. I told him we would do that.

On another note, he had concerns with our Recommendation to the first Condition. We state "We recommend that CSM refund the Government for the Government's portion of (participation in) the $39,271,015 of expressly unallowable costs plus the applicable penalties and interest required by law." He says we need to cite the regulation that makes these expressly unallowable and allows for penalties and interest. I think he has a point here. He asked to have this by close of business Wednesday, and I told him that Kirk would address this and get back to him. Remember that to be expressly unallowable the regulation has to literally say the costs are unallowable.
He mentioned that he wants this tomorrow because he is involving RST and knows that ONR has a negotiation deadline, so I think that is a positive sign. I did tell him that the PERA issue would not be done by tomorrow and he understands that.

(emphasis added)

21 May 2014: PERA essentially concurred with our findings in an email, but declined (understandably) to actually describe CSM’s conduct as “unallowable”. PERA Project Manager Koren Holden stated in an email:

Generally, your statements are accurately worded, your logic correct and applicable to all periods covered in our letter

I provided the email to Mr. McAfee, Mr. Quant and Mr. Jones.

27 May 2014: At the direction of DCAA Assistant Director Don McKenzie, DCAA Headquarters officers Tom Martin and Jason Besser intervened in the engagement and asked some questions related to the engagement. Mr. McAfee ordered the DBO to cooperate, and Mr. Jones suggested a telecon with all parties.

27 May 2014: I sent an email to Ms. Graff reiterating my concerns related to Mr. McAfee and Ms. McKune as follows:

As I mentioned during that conversation, I formally accused Deputy Regional Director Martha McKune and Regional Audit Manager Jerry McAfee of official misconduct related to their actions on the NEON engagement to the DCAA Internal Review Directorate, the Inspector General of the Department of Defense, the Inspector General of the National Science Foundation, and the oversight committees and subcommittees of the United States Congress. DCAA Management (including, presumably, Ms. McKune and Mr. McAfee) are aware of these accusations. I am, therefore, concerned that there is at least the appearance of impropriety in continuing to allow Ms. McKune and Mr. McAfee to exercise management authority over me and any audit work I am performing. Specifically, I refer to the current audit disagreement on our examination of the Colorado School of Mines in which I uncovered a major oversight by the Government related to the payment of pension costs that has nation-wide implications for public institutions of higher education. This matter has also been reported to the Congress, and the audits of CSM will be watched with some interest by members of that body going forward due to the potential impact on taxpayer.

Regardless of the ultimate outcome of the allegations made by me against Ms. McKune and Mr. McAfee -- there can be no doubt that I firmly believe them to have committed misconduct and that any interaction I have with them (and, most likely, they with me) will be colored by those allegations. Therefore, I believe that it is inappropriate to continue to allow them to exercise supervisory/management

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authority over me, or any audit upon which I am working, until they are cleared by the investigators looking into the NEON matter. To do otherwise compromises the independence of both me, and Ms. McKune and Mr. McAfee. Furthermore, if the allegations are ultimately substantiated, it would call into question any work they have performed in the interim. Finally, any negative action that they should take either against me personally or against any audit upon which I am working, however justified, will have, at best, the appearance of impropriety -- and could very well be viewed by a reasonable person as retaliation for my putting forward the allegations against them.

Therefore, I request that Ms. McKune and Mr. McAfee be removed from oversight over either me, or the audits upon which I am performing work, pending the outcome of the various inquiries into the NEON matter. I understand that this is a very serious step to take, but I believe that the facts and circumstances of the instant case justify it.

If you have any questions or concerns on this matter, please do not hesitate to contact me.

(emphasis added)

Ms. Graff did not respond to the request, and did not remove Ms. McKune or Mr. McAfee from the CSM or NEON audits, nor my chain of command.

29 May 2014: Telecon between the DBO, Central Region, and DCAA Headquarters regarding the CSM audits. Headquarters stated that they wanted further information regarding the application of Governmental Accounting Standards Board (“GASB”) Statement No. 27 to CSM. We agreed to do so.

I revised the SOCAR to include the requested information and sent it to Mr. Quant and Mr. Jones via email. We concluded that GASB Statement No. 27 was concerned with the presentation of pension liability on CSM’s books, not the calculation and assignment of its pension costs, which the statement said was to be performed in accordance with the standards of the Actuarial Standards Board (“ASB”).

Therefore, we concluded that CSM’s failure to fully fund the amount of cost assigned by its actuaries to a given fiscal year rendered that amount unallowable by operation of 2 CFR § 220 –confirming our original finding. PERA confirmed our interpretation in an email on the same date.

29 May 2014: At the end of the day, I provided an update to the Congress via email:

As of now, the NEON examination is still at the "independent" review at the Northeastern Region. I have requested but have not received an update as to when that review is expected to be completed.

Last week I spoke to the new Central Region Director Diana Graff. Ms. Graff is another former employee of DCMA Director Patrick Fitzgerald when he headed up the Army Audit Agency. I provided Ms. Graff with a full briefing on the NEON issues, including the alleged
misconduct of her new subordinates Mr. McAfee and Ms. McKune. I specifically stated that I felt very strongly that continuing to have Ms. McKune and Mr. McAfee exercise supervisory authority over me after I had accused them of official misconduct had, at the very least, the appearance of impropriety. I was particularly concerned that any official action taken regarding either me or my work would have the taint of retaliation. Ms. Graff stated that she was concerned by this information (the allegations of misconduct), which she had not been provided previously by the Director, even though they had discussed the NEON audit in some detail. She stated that she would review the allegations and get back to me.

On 27 May I followed up with an email (attached hereto) requesting formally that Ms. McKune and Mr. McAfee be removed from my chain of command and oversight of both me administratively and the work I am currently performing. To date, I have received no response from Ms. Graff, and Mr. McAfee in particular continues to exercise direct supervisory authority over my audit work. Obviously, it is concerning that DCAA is not concerned enough by the allegations to even temporarily reassign Mr. McAfee or Ms. McKune pending the outcome of the various inquiries (internal and external) into their conduct. Instead, they both remain in charge of the very audit that lead to the allegations of wrongdoing, as well as other audits in which I am involved. I am also concerned that they are actively working to remove audit findings from another draft report that found extensive improper costs related to State public employee pension funds in Colorado and, it appears, throughout the country. Ms. Graff has personally sat in on several of the meetings involving Ms. McKune and Mr. McAfee regarding this audit, which appears to indicate that she is at least somewhat concerned by the situation. I will keep you informed of any developments on this issue.

(emphasis added)

30 May 2014: DCAA Headquarters (Policy) issues a formal memo requesting that we perform further procedures on the CSM pension cost issue (and another finding not at issue here). Ms. McKune orders Mr. Jones to and the DBO to “[r]eassess its audit finding using the appropriate criteria from GASB Statement 27, paragraph 19.” Mr. Jones forwarded the email to Mr. Quant and I and noted:

Please see Martha's instructions below. Her instructions are based on the attached memo from Policy. We've revised the draft SOCAR to consider GASB 27 and sent that back to Policy for review and comment. I'm not sure what to do with items 2 and 3 below. The contractor agrees with our determination. We should discuss this, i.e. Kirk and I since Mike is in training, tomorrow.

2 June 2014: After discussion, Mr. Jones responds to Mr. McAfee in an email:

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We responded to Policy’s questions/suggestions on the pension issue last Friday with a revised version of the SOCAR and we are waiting on their response. You were copied on that e-mail.

We have considered the comments on the cash basis issue and plan to provide information later today.

I do not believe the DRD has made a final decision as we are in the fact findings phase with Policy. I think her statement below is expressing her agreement in what Policy suggested we do. So we have handled the pension and will be responding to the cash basis issue today.

(emphasis added)

Therefore, Policy’s instructions were to review GASB No. 27 and reconsider our findings. We reviewed the instructions and concluded that we had already addressed the issues related to GASB No. 27 in our earlier response. It was clear that Policy had not reviewed the revisions we had made after the telecon before sending the memo. Therefore, Mr. Jones explained the situation to Policy via email.

3 June 2014: Mr Jones wrote to Ms. Graff via email:

I know we owe you a status on the subject audits. At this point, we have responded to the suggestions/comments provided by HQ Policy on the pension and cash basis leave issues. We are waiting for their reply.

4 June 2014: Ms. Graff responded to Mr. Jones and states:

Policy will not have to decide on this again, unless Martha chooses to engage them. Allen as we discussed on the phone, last week, you assured me that you would abide by the decisions made by the DRD. I urge you to get this audit moving in an effort to meet our statutory suspense date of June 30, 2014. If you all still disagree, as we discussed you can note that disagreement in the working papers. At this point we need to issue our product in line with the decisions made by Martha. As a reminder, here is a part of Martha’s email:

As it relates to the pension costs, Policy indicates the FAO did not fully consider the GASB requirements for establishing GAAP for state and local Governments and therefore should use specified GASB criteria. As a result, Policy recommends the FAO:

1. Reassess its audit finding using the appropriate criteria from GASB Statement 27, paragraph 19.

2. If you determine the 2013 pension costs were not measured and assigned properly, you should discuss this with the contractor and its public accountants to determine the basis for the financial statements and

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coordinate the basis for any disagreement you have with the contractor's published financial statements with RST-3 and PAC.

3. Prospectively request the contractor disclose its actual pension cost accounting practices.

As it relates to the Vacation and Sick Leave, the FAO should not issue the SOCARs until it performs analysis to determine if the noncompliance is material. Policy indicated there does not appear to be sufficient documentation to support the materiality.

I trust that this matter will be resolved in an expedient manner. Please feel free to call me if you have any questions.

It is clear from this email that Ms. Graff is ordering Mr. Jones to subordinate his judgement (as well as that of his team – including me) to Ms. McKune. The implication is clear: Mr. Jones fails to obey Ms. McKune at his peril. This is entirely inappropriate and a direct violation of the Code. Mr. Jones as engagement partner must be free to exercise his own independent judgment. This is especially concerning because 1) Ms. McKune had not communicated a decision to us, but apparently had already made one – the same as with NEON and 2) Policy issued us with instructions not with a decision – therefore, Ms. Graff proceeding as if Policy had actually come to a determination was error, and caused serious problems later, as discussed below.

5 June 2014: I send the following to the Congress via email:

The effort to resolve the NEON audit has not advanced beyond the point discussed in my last email on the subject. However, DCAA recently completed Agency-wide training on addressing issues of fraud, the primary issue in the NEON audit. The training was so disturbing that I felt it needed to be shared with the Congress forthwith.

As you may know, DCAA is required by rule and law to follow Generally Accepted Government Auditing Standards ("GAGAS") in the performance of its audits. GAGAS in turn has very specific requirements for the reporting of fraud. GAGAS 5.07 states:

[W]hen performing a GAGAS examination engagement, auditors should design the engagement to detect instances of fraud [...] that may have a material effect on the subject matter or the assertion thereon of the examination engagement.

GAGAS 5.20 states:

When performing GAGAS examination engagements, auditors should report, based upon the work performed, [...] instances of fraud [...] that have a material effect on the subject matter or an assertion about the subject matter and any other instances that warrant the attention of those charged with governance [...] Auditors should include this information either in the same or in separate report(s).
GAGAS 5.21 states:

If auditors report separately (including separate reports bound in the same document) on the items discussed in paragraph 5.20, they should state in the examination report that they are issuing those additional reports. They should include a reference to the separate reports and also state that the reports are an integral part of a GAGAS examination engagement.

GAGAS 5.24 states:

When performing a GAGAS examination engagement, and auditors conclude, based on sufficient, appropriate evidence, that any of the following either has occurred OR IS LIKELY TO HAVE OCCURRED, they should include in their examination report the relevant information about [...] a/ FRAUD [...] that [has] a material effect on the subject matter or an assertion about the subject matter and any other instances that warrant the attention of those charged with governance" (emphasis added).

Unfortunately, DCAA's official policy is NOT to comply with these requirements. Our training specifically included the statement that actual or suspected fraud is NEVER to be reported in a DCAA audit report. This statement is confirmed by DCAA's written audit policies.

The DCAA Contract Audit Manual ("CAM") is DCAA's official policy for conducting audits. CAM § 2-404(c) states:

When fraud or suspected irregularities are discovered, DCAA policy is for the auditor to prepare a Form 2000 ... instead of including the issue in the audit report.

CAM § 4-702.6 continues:

The auditor's responsibility for detecting fraud ends with the submission of a Form 2000 or Hotline referral.

Therefore, it is the official policy of the Defense Contract Audit Agency NOT to report fraud in its audit reports.

Obviously, this written policy and consistently followed practice is seriously concerning for at least two separate reasons. First, it is prima fascie evidence of noncompliance by DCAA with GAGAS. Second, it guarantees that audit reports for engagement that did determine that fraud has occurred, or is likely to have occurred, will be materially false or misleading because they will, in EVERY case, omit any mention of the actual or suspected fraud -- and this vital information will not be passed on the contracting officer(s) that are responsible for safeguarding the taxpayers' money.
Given this shocking abrogation of duty by DCAA's policy, as demonstrated in the instant case at NEON, I felt that this information should be brought to your attention immediately.

DCAA does make a couple of arguments trying to support its policy that I do want to quickly address.

First, DCAA claims that reporting actual or suspected fraud in its audit reports could compromise a criminal investigation. However, GAGAS 5.10 states:

Avoiding interference with investigations or legal proceedings is important in pursuing indications of fraud, noncompliance with provisions of laws, regulations, contracts, or grant agreements, or abuse. Laws, regulations, or policies may require auditors to report indications of certain types of fraud, noncompliance with provisions of laws, regulations, contracts, or grant agreements, or abuse to law enforcement or investigatory authorities before performing additional audit procedures. When investigations or legal proceedings are initiated or in process, auditors should evaluate the impact on the current examination engagement. In some cases, it may be appropriate for the auditors to work with investigators or legal authorities, or withdraw from or defer further work on the examination engagement or a portion of the examination engagement to avoid interfering with an ongoing investigation or legal proceeding.

GAGAS 5.26 further states:

When fraud, noncompliance with provisions of laws, regulations, contracts, or grant agreements, or abuse either have occurred or are likely to have occurred, auditors may consult with authorities or legal counsel about whether publicly reporting such information would compromise investigative or legal proceedings. Auditors may limit their public reporting to matters that would not compromise those proceedings and, for example, report only on information that is already a part of the public record.

Therefore, GAGAS makes it clear that DCAA should consult with law enforcement and can take several different actions to avoid compromising a criminal investigation: 1) limit "public" reporting the information in the public record, and issue a separate report under GAGAS 5.20 and GAGAS 5.21 -- that separate report could then be held pending the resolution of the criminal investigation; 2) delay the audit until the criminal investigation is completed; and, 3) withdraw from the audit. None of these three options includes issuing a false audit report not containing the fact that fraud has occurred, or is likely to have occurred.

Second, DCAA claims that it can only report fraud when an actual conviction has been obtained in a court of law. This claim is absurd. First off, the whole point of GAGAS is to
report audit findings. If a person has already been convicted, there will not be any need for the audit to find the fraud.

Secondly, this 'interpretation' totally overlooks the use of the phrase "or is likely to have occurred" in GAGAS 5.24, which explicitly contradicts DCAA's argument that fraud must have been proven in court before it is reportable.

Third, DCAA claims that reporting actual or suspected fraud leaves its auditors open to personal liability (this statement is actually made in the written training materials, which I can provide upon request). Not only is this an unreasonable scare tactic that virtually guarantees that DCAA auditors will NEVER report fraud -- but it is also false. DCAA auditors are protected in their official duties from all but the most objectively unreasonable acts by sovereign immunity.

Fourth, DCAA claims that the requirement that auditors report suspected fraud in a DCAA Form 2000 is sufficient to meet the GAGAS requirements. This claim is demonstrably false for a couple of reasons. First off, GAGAS 5.24 states that if an auditor determines that fraud has occurred or is likely to have occurred, they must report this fact "in their examination report". A DCAA Form 2000 is NOT an "examination report", because it does not comply with GAGAS due to, amongst other reasons, the fact that it is not reviewed by a supervisor, is not included in the audit working papers, and is not even mentioned in the audit report as required by GAGAS 5.21 for separate reports. Also, it goes to the cognizant criminal investigators, not the contracting officers responsible for protecting the taxpayer.

Fifth, DCAA claims that reporting actual or suspected fraud in the audit report could compromise the criminal investigation because the contracting officer could give a copy of the report to the contractor and/or the contracting officer could be involved in the fraud. This argument is disposed of by the same counterargument as in the first DCAA argument above. DCAA can report under separate cover (not initially to the contracting officer) or delay the audit until the criminal investigation is completed -- and only then release the separate report or continue the audit.

Therefore, I conclude that DCAA has simply deliberately deserted its legal obligation to report actual or suspected fraud in its audit reports. Obviously this also helps explain why I was never allowed to use the term "fraud" in the NEON audit report -- and also explains at least in part management's hostility to my original findings (which, while they do not use the magic word "fraud", pretty strongly make the case for it).

Again, given the extreme seriousness of this matter -- one of DCAA's primary responsibilities is to detect fraud, waste, and abuse in DoD contracts after all -- I want to bring it to your attention immediately.

(emphasis added) (internal quotation marks omitted)

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Based on the above, it is clear that, entire separate from the other issues discussed herein, DCAA has directly violated GAGAS insofar as it is DCAA’s written policy and consistent actual practice never to report actual or suspected fraud in our examination reports. Further, as also noted above, this explains the demonstrated hostility of DCAA management to the version of the NEON findings approved by the engagement partner Mr. Jones – which had serious fraud implications.

Due to the seriousness of the allegations, I submitted a report to DoDIG via the Hotline (submission 20140605140043095). I have never received a response from DoDIG related to this submission.

5 June 2014: Mr. Jones provides the latest draft of the CSM pension noncompliance SOCAR to Ms. Shipp.

6 June 2014: I issue two additional referrals to the DoDIG.

The first (20140606100223463) states:

Angela Janysek is the Assistant Director of the Internal Review Directorate (“IRD”) at the Defense Contract Audit Agency (“DCAA”). She is a former criminal investigator with Army CID. IRD is charged with investigating allegations of misconduct within DCAA, including performing investigations at the request of DoDIG. This requires Ms. Janysek and her subordinates to remain functionally independent of DCAA in order to avoid conflicts of interest. Earlier this year, I made a series of allegations of misconduct against DCAA officials to IRD, DoDIG and several committees/subcommittees of the United States Congress. The substance of these allegations can be found in my various hotline complaints and my DCIS interview file and relate primarily to an audit conducted by the DCAA Denver Branch Office of the National Ecological Observatory Network (NEON) of Boulder, Colorado. During the course of the various investigations into the matter by DoDIG, IRD and Congress, Ms. Janysek began to exercise management authority over the disputed audit. Specifically, Ms. Janysek repeatedly acted to resolve NEON audit issues in the capacity of audit management, despite the fact that two of her subordinates (Supervisory Investigator Suzanne Howe and Investigator Sophia Blake) were at that time actively investigating allegations of misconduct on that audit. Ms. Janysek acted on behalf of DCAA Director Patrick Fitzgerald to have the NEON audit moved from the Central Region to the Northeastern Region. She also spoke numerous times to me about resolving the audit issues. None of these actions were related to her investigatory duties; all were the actions of audit management. By taking on the role of audit management whilst actively overseeing in an investigation of that same audit compromises the independence, objectivity, and integrity of both. Ms. Janysek’s job is to investigate allegations of wrongdoing. In the instant case, she has now put herself and her office in the position of investigating her own audit management actions – which is absolutely prohibited by rule and law. DoDIG is responsible for supervising its subordinate investigatory bodies such as an agency’s internal review function, and is therefore responsible for resolving this issue.

NOTE: I have attached hereto a representative selection of emails showing Ms. Janysek

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exercising audit management rather than investigatory authority. These are only a small number of the total body of such communications, but do serve to support these allegations.

The second (the number of which I have misplaced) states:

Beginning in June 2013, I filed a series of complaints with DoDIG and various committees/subcommittees of the United States Congress against Deputy Regional Director Martha McKune and Regional Audit Manager Jerry McAfee alleging official misconduct related to the Defense Contract Audit Agency’s (“DCAA”) audit of the National Ecological Observatory Network (“NEON”) of Boulder, Colorado. Further details of this issue can be found in my various Hotline filings and my DCIS interview file. Active Congressional inquiries are underway on the matter, and to the best of my knowledge DoDIG is also actively looking into the matter.

Mr. McAfee (GS-15) is my 3rd level supervisor, and Ms. McKune (SES) is my 4th level supervisor. They are aware of the allegations I have made against them because my 3rd level supervisor Mr. Allen Jones (GS-14) informed them of my communications on the matter with the Congress, and because the Assistant Director of DCAA’s Internal Review Directorate Ms. Angela Janysek (SES) informed them of the DoDIG inquiry into the matter. As a routine matter, I requested that DCAA Central Region Director Diana Graff (SES) and Ms. Janysek (on behalf of DCAA Director Patrick Fitzgerald, SES and DCAA Deputy Director Anita Bales, SES) remove Ms. McKune and Mr. McAfee from my chain of command pending the outcome of the various inquiries into their conduct. To date, Ms. McKune and Mr. McAfee remain my superiors and continue to exercise management authority over me and my work. They also continue to exercise management authority over the NEON audit, even though they stand accused of official misconduct related to that audit.

This presents a very clear conflict of interest which compromises the integrity, independence, and objectivity of DCAA audit responsibilities under Generally Accepted Government Auditing Standards. I have accused Ms. McKune and Mr. McAfee of official misconduct. They are fully aware of the accusations. Regardless of the veracity of those allegations, our interactions are tainted by the unresolved allegations – and essentially none of the parties assume that any of the others are acting in good faith. This critically compromises my ability to perform my audit duties because I cannot trust in the good faith of my chain of command. Even now Ms. McKune and Mr. McAfee are taking action on another audit in the same manner that led to the allegations of misconduct against them. This is not a tenable situation.

Furthermore, leaving individuals accused of serious misconduct in charge of the very thing they are accused of botching creates, at the very least, the appearance of impropriety. Until Ms. McKune and Mr. McAfee are cleared of any wrongdoing, it is inappropriate to leave them in charge of the NEON engagement, or any other audit involving their accusers.

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(including myself). Therefore, they should be removed from their responsibilities over the NEON engagement and all other engagements out of my office pending the outcome of the various inquiries and investigations. This is the same logic of removing a police officer accused of misconduct from the investigation on which the alleged misconduct occurred until that officer is cleared of wrongdoing. To do otherwise represents a clear conflict of interest as both Ms. McKune and Mr. McAfee have every reason to ensure that the outcome of the NEON engagement and all other engagements out of my office pain them in as favorable of light as possible, and me and my immediate superiors in as disfavorable [sic] of light as possible. They should not be allowed to do so.

6 June 2014: I write to NSF-IG Lerner via email and state:

Pursuant to my last communication with you on the subject issue, I wanted to take the opportunity to bring you up to speed on developments with DCAA's audit of the National Ecological Observatory Network ("NEON"). As you will recall from our prior conversation, DCAA Central Region Management ordered the Denver Branch Office to remove all references to any noncompliances from the NEON audit report and issue an unqualified opinion as the adequacy of NEON's accounting system. Subsequent to that order, I resigned from the NEON engagement pursuant to the Code of Professional Ethics of the American Institute of Certified Public Accountants and the laws governing the practice of public accounting in the State of Colorado. I also filed reports with the Office of the Inspector General, United States Department of Defense and the various oversight committees and subcommittees of the United States Congress alleging official misconduct by the DCAA officials who gave the order. Investigations were opened by DoDIG and the Congress, and are currently in progress. I was interviewed by the Defense Criminal Investigative Service's special agents in April, and expect to have a report on their findings in this matter shortly. [Note: I never received the DCIS report or any further communication from DCIS, as noted above]

Perhaps as a result of the above, the Director of DCAA Patrick Fitzgerald personally ordered the NEON engagement to be sent to the Northeastern Region of DCAA for an additional review. Once that review is completed, a meeting is to be held in Denver where the Director will make a final determination as the NEON audit report's contents. This appears to have overridden the original order to 'whitewash' the audit report, although a formal reversal of the order has never been made. [Note: DCAA never provided any written documentation or verbal explanation as to how Ms. McKune's 'final decision' became a not-so-final decision]

I do note that the DCAA officials responsible for the original order to remove the audit findings and whom I subsequently accused of misconduct remain in charge of the engagement, despite a clear conflict of interest and the appearance of impropriety that will exist unless and until they are formally cleared of any wrongdoing related to the audit. I have also reported this fact to the DoDIG and the Congress. This calls into serious
question the ability of the NSF-OIG to rely on the audit results, whatever they may eventually turn out to be.

…

(emphasis added).

6 June 2014: Mr. Jones departs for a 1-week vacation in Ecuador.

Week of 9 June 2014: Mr. McAfee verbally orders me to have no further contact with NSF-IG, including specifically Ms. Lerner. Mr. McAfee states that I am not to discuss the NEON engagement with anyone outside of DCAA without authorization from DCAA Headquarters. I ask whether Mr. McAfee will put the order in writing, and he states that he is “not stupid” and will not do so. Given the blatant illegality of this order and Mr. McAfee’s unwillingness to put it in writing, I simply ignore it.

9 June 2014: Counsel for a Senate committee stated in an email to me:

After speaking with NSF OIG, I understand that they considered your fraud referral and determined that there were no violations of the False Claims Act. NSF OIG is still investigating whether the reimbursement of nonallowable costs was inappropriate, even if not fraudulent. I am awaiting their conclusions on this issue as well as DCAA's audit results on this point. Despite the length of time it has taken DCAA to get to this point, DCAA expects to have completed its results by the end of the month.

I responded:

I am pretty concerned by this response […], because it sounds like the NSF-OIG accepted DCAA management's position that no fraud has occurred. The fraud referral is over a year old now, so the fact that they relied on that to make their determination is also worrying -- especially because I did not know about the lobbying/Bryd Amendment issues at that time. Obviously, that raises some serious questions about the professional competence of the NSF-OIG that they have not bothered to follow up on the matter.

9 June 2014: In response to my concerns above, I provide a revised fraud referral to the NSF-OIG with the latest information. NSF-OIG takes no action on the matter (again, apparently as a result of the 26 March meeting in which DCAA Deputy General Counsel Hoffman stated that no fraud had occurred, despite any legal authority for making such a statement).

I stated in the email containing the revised referral:

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It is my understanding from speaking to [...] NSF-OIG has determined in response to the fraud referral issued under my signature on 17 May 2013 that no fraud has occurred at NEON related to the payment of "management fee".

I am concerned that the NSF-OIG is relying on a mere referral (rather than a complete audit) that is also over a year old in making that determination. As such, I have prepared a revised referral with the latest facts and circumstances regarding NEON's use of management fee and have attached it hereto. I call your attention particularly to the discussion of the alleged Byrd Amendment violation, as that information is entirely new. You will also note references to the final guidance under 2 CFR § 200 which is also new. I strongly urge you to consider this information and reconsider the NSF-OIG’s position on this matter.

I would also like to note that if NSF-OIG relied in any way on the 'legal opinion' of the DCAA Deputy General Counsel that no fraud had occurred that was provided to your office by Mr. Jerry McAfee, such reliance is misplaced as the DCAA Deputy General Counsel had no authority in rule nor law to make such a determination.

10 June 2014: In response to the above, a Senate staffer made inquires and stated to me via email:

NSF OIG stated that it made its determination independent of the Deputy GC’s opinion.

I cannot reconcile this statement with the meeting of 26 March between DCAA and the NSF-IG for the specific purpose of discussing Mr. Hoffman’s opinion. If NSF-IG did not use Mr. Hoffman’s opinion, then what was the purpose of the telecon?

10 June 2014: I write to Ms. Janysek and state:

I wanted to follow-up by email. A representative for the Subcommittee on Financial and Contracting Oversight U.S. Senate Homeland Security & Governmental Affairs Committee informed me that DCAA stated to the Subcommittee that the NEON audit would be issued by the end of June. Given that we still have to 1) decide which, if any, SOCARs to issue; 2) make any needed changes to those SOCARs; 3) issue the SOCARs to NEON for review; 4) address NEON's comments to the SOCARs; and, 5) draft and issue the final audit report -- I am not sure how we expect to issue the audit report before 30 June, unless the decision has already been made to issue a clean (unqualified) report (which could be done before 30 June since there would be nothing for NEON to review). I am also concerned that FAO Manager Allen Jones will be out of the office until next week, which leaves us with a very compressed timeframe for resolving the disagreements and issuing the report. As such, I would appreciate some clarification as to the expected plan and timeline for resolving the NEON engagement.
It appears that DCAA management had no intention of giving us a fair hearing at the Northeastern Region, but had instead already made up its mind and fully intended to subordinate our judgement and order the findings removed from the report.

Note: this prediction ultimately turned out to be entirely accurate.

10 June 2014: Ms. Janysek responded:

… Regarding the NEON audit, the review by NER is complete and the Responsible Authorities at the Headquarters will be working with the respective Regions and the FAO Manager to schedule the meeting to discuss the outcome. Please let me know if you have any further concerns.

How the Northeastern Region (“NER”) review could be complete without consultation with the engagement partner continues to defy explanation.

11 June 2014: I contact the Governmental Accountability Office (“GAO”) via email and state:

I am at present a Senior Auditor with the United States Department of Defense - Defense Contract Audit Agency ("DCAA"). The purpose of this missive is discuss the compliance of that Agency with Generally Accepted Government Auditing Standards ("GAGAS") and should be distributed to the appropriate parties within the GAO cognizant of this issue. A brief discussion follows:

As you know, the Defense Contract Audit Agency is charged by law with performing audit and attestation engagements of Federal contractors and grantees under GAGAS. DCAA is required by GAGAS to be independent of both the Department of Defense (specifically the Defense Contract Management Agency and the various buying commands), and the contractors/grantees.

However, based on a thorough analysis of DCAA's position within the Department of Defense ("DoD"), it is readily apparent that DCAA's independence from the DoD is nothing more than a legal fiction.

Specifically, I note that DCAA and DCMA report to the same boss - the Secretary of Defense. DCAA and DCMA claim to be independent of one another because DCAA reports to the Undersecretary of Defense - Comptroller while DCMA reports to the Undersecretary of Defense for Acquisition, Technology and Logistics. However, as noted above, both of these positions report to the Secretary of Defense. This would be the equivalent in public accounting of having the "independent" auditors report to the controller, whilst the rest of the company reports to the chief operating officer. Clearly, this would not be an independent relationship because both the controller and the COO report to the same management official. We would never accept a public accounting firm performing audits under GAGAS (for example, Single Audits under OMB Circular A-133
and the Single Audit Act) reporting to management of an entity that is part of the audit. Why then would we accept exactly the same scenario from DCAA?

It is virtually guaranteed that this issue has been explored prior to my bringing it up here. However, given the vital important of independence in both fact and appearance when performing GAGAS engagements, I think that it is worthy of taking another look at this issue. DCAA is the only GAGAS audit entity within the Government (to the best of my knowledge) that reports to executive branch management. Every other entity (the GAO, the various inspectors general, etc.) report to Congress or some other body charged with governance other than management. Therefore, I strongly believe that DCAA is not independent of DoD to the extent required by GAGAS.

As such, all audit work performed in that Agency is not compliant with GAGAS.

This is a very brief summary of this issue. I have not attempted to get into the independence framework set by GAGAS nor the Statements on Standards for Attestation Engagements of the American Institute of Certified Public Accountants, which DCAA is also required to follow.

Therefore, if this issue is of any concern to the GAO, I strongly urge you to contact me to discuss the matter in further detail and determine whether a material and pervasive noncompliance with GAGAS exists. If it does, then ALL of the work performed by DCAA is likely invalid under GAGAS -- which would be catastrophic for Government.

This is the subject of my referral of 20 April 2015.

11 June 2014: I issue a referral of suspected fraud/waste/abuse to the Department of Health and Human Services Inspector General (“HHS-IG”) copied to DCAA Headquarters in which I state:

The Defense Contract Audit Agency is presently undertaking an examination of the Colorado School of Mines (CSM) that has detected a suspected irregularity. That irregularity also appears to apply to the University of Colorado system that falls under the United States Department of Health and Human Services. Therefore, we are referring our draft findings regarding CSM so that HHS can make a determination whether any irregularity exists at the University of Colorado. A summation of our draft findings at CSM follows:

CSM maintains a defined benefit pension plan with the Colorado Public Employees’ Retirement Association (PERA). PERA and CSM are both state government entities, and are subdivisions of the State of Colorado. Participation in the PERA defined benefit plan is mandatory for all qualified CSM employees. CSM belongs to the “State Division” of PERA.

The State Division is a “cost-sharing multi-employer plan” as defined by Governmental Accounting Standards Board (GASB) Statement No. 27 (see PERA’s 2012 Annual Report,
Page 35). A cost-sharing multiple-employer plan is one in which the participating state government employers pool their assets and their obligations to provide defined benefit pensions – meaning that plan assets can be used to pay the pensions of the retirees of any participating employer (see the GASB Cost-Sharing Employer – Pension Fact Sheet http://www.gasb.org/es/ContentServer?c=Page&pagename=GASB%2FPage%2FGASBSectionPage&cid=1176160452263). This means that the State Division of PERA is considered a single pension plan, a fact we further verified through inquiry to PERA during fieldwork.

CSM pays PERA a contribution amount equal to its PERA eligible salaries multiplied by a contribution rate each pay period. The contribution rate consists of three rates, the “Statutory Rate”, the “Amortization Equalization Disbursement” (“AED”) and the “Supplemental Amortization Equalization Disbursement” (“SAED”). The amounts of those rates are dictated by Colorado law and may change over time. We inquired of PERA as to how the rates are set. PERA stated that the contribution rates are set by the Colorado Legislature, are not required to be prepared in accordance with Generally Accepted Accounting Principles, and thus need not be equal to the amount required to fully fund PERA’s normal cost assigned to each year.

The allowability of claimed costs at CSM are determined in accordance with 2 C.F.R. Part 220. Appendix A(J)(10)(f)(3)(a) of that regulation states:

> Costs of the institution’s pension plan which are incurred in accordance with the established policies of the institution are allowable, provided […] the amount of pension cost assigned to each fiscal year is determined in accordance with subsection (b), and the cost assigned to a given fiscal year is paid or funded for all plan participants within six months after the end of that year. […] (emphasis added)

2 C.F.R. Part 220, Appendix A(J)(10)(f)(3)(b) states:

> The amount of pension cost assigned to each fiscal year shall be determined in accordance with generally accepted accounting principles. (emphasis added)

Therefore, any portion of the pension liability assigned under Generally Accepted Accounting Principles (GAAP) to a given fiscal year that is not funded for all plan participants within six months of the end of that year is unallowable.

However, is not immediately clear from the regulation whom shall assign the costs in accordance with GAAP to comply with the regulation. GASB Statement No. 27 dictates two different applications of GAAP – one to the books of CSM, and another to the books of PERA. Specifically, in a cost-sharing multi-employer plan like PERA’s State Division, each participating entity like CSM only records a liability on its books if it has not paid the statutorily required contribution rate by the State Legislature. Since CSM generally pays the statutorily required contribution rate set by the Legislature each month, it only shows a liability if it has not yet made the next monthly payment to PERA (see e.g., PERA’s 2012 Annual Report, Page 35). CSM does not currently show a liability to PERA because it
asserts that it has fully paid its liability to PERA based on the rate determined by the Legislature. We confirmed this assertion during our incurred cost examination of CSM's FY 2012 and FY 2013 fringe rates under DCAA Assignment No. 03121-2012J10100001. Therefore, CSM's books will only reflect over or under contributions, not over or under funding.

Meanwhile, PERA records on its books the normal cost assigned to each year (collectively called the Accrued Actuarial Liability) in accordance with GASB Statement No. 27. Therefore, PERA's books will reflect over and under funding using a figure called the Unfunded Accrued Actuarial Liability (UAAL). The UAAL represents the difference between the amount of cost PERA's actuaries assigned to each prior fiscal year in accordance with GAAP (the previously mentioned Actuarial Accrued Liability) and the amount actually funded by the member entities (called the “Funded Amount”), including CSM.

The question then is which set of books (and, thus, which GAAP) 2 C.F.R. Part 220, Appendix A(J)(10)(f)(3)(b) is referring to. We conclude that the regulation is referring to PERA's books and, thus, the costs assigned by PERA on its books to a given fiscal year in accordance with GASB Statement No. 27 must be fully funded within the period defined by 2 C.F.R. Part 220, Appendix A(J)(10)(f)(3)(b). We draw this conclusion based on the following analysis:

First, 2 C.F.R. Part 220 explicitly states that “the cost assigned to a given fiscal year is paid or funded for all plan participants within six months after the end of that year” (emphasis added). The regulation makes no mention of the word “liability”, the term that GASB Statement No. 27 and PERA (see, e.g. 2012 Annual Report, Page 35) uses to refer to the amount, if any, recorded on CSM's books.

Second, since the State Division is considered one pension plan under the rules for a cost-sharing multi-employer plan – the “cost assigned … for all plan participants” logically refers to the normal cost on PERA's books, not the liability (if any) on CSM's books because that liability only represents past due contributions owed currently to PERA for CSM's participants, not the “cost” for “all” participants. To put it another way, the use in the regulation of the term “cost” as opposed to “liability” and the phrase “all plan participants” (emphasis added) means that the regulation is concerned with the funding of the costs on PERA's books, not the liabilities (if any) on CSM's books. GASB Statement No. 27 strongly supports this assertion, as it defines “normal cost” as: “That portion of the Actuarial Present Value of pension plan benefits and expenses which is allocated to a valuation year by the Actuarial Cost Method” (Paragraph A-3). This is the definition of the cost on PERA's books, not the liability on CSM's. It is also a near-perfect match to the cost assignment concept in 2 C.F.R. Part 220. Note 3 to the previously referenced Statement No. 27 paragraph further states: “For pension plan benefits which are provided in part by employee contributions, Normal Cost refers to the total of employee contributions and employer Normal Cost unless otherwise specifically stated.” Since CSM does not record anything related to employee contributions on its books, this further confirms that the term “cost” in 2 C.F.R. Part 220,
Appendix A(j)(10)(f)(3)(b) refers to the “normal cost” on PERA’s books, not the liability on CSM’s.

Third, we reviewed GASB Statement No. 68, which supports our interpretation above. This Statement was issued in 2012 and supersedes GASB Statement No. 27 for CSM’s fiscal years beginning after June 15, 2014. CSM’s first covered fiscal year will begin on July 1, 2014. The new Statement notes:

Applying the definition of a liability from Concepts Statement 4, the Board concluded that an individual cost-sharing employer’s liability for pensions should be based on the degree to which that employer is expected to be required to sacrifice resources (in the form of contributions to the pension plan) to satisfy the present obligation. (GASB Statement No. 68, Appendix B, Paragraph 299).

This paragraph significantly clarifies the GASB’s thinking on the subject issue. It makes it clear that the true “cost” is not the amount the Colorado Legislature requires CSM to pay, but rather the amount that PERA determines it will be required to pay to satisfy its obligations. We noted from PERA’s FY 2012 Annual Report that PERA sets an Annual Required Contribution (ARC) rate in excess of the rate set by the State Legislature. The ARC is “The employer’s periodic required contributions to a defined benefit pension plan, calculated in accordance with [GAAP]” (GASB Statement No. 27, Page 37). The ARC therefore represents the amount that must be paid in a given year by all plan participants to fully fund the costs assigned to that year. When the contribution rate set by the Legislature is less than the ARC, the cost assigned to that year will not be fully funded during the year.

To put it another way, The ARC represents the amount that will have to be funded to meet CSM’s obligations, whilst the rates set by the Legislature represent what CSM is actually paying towards those obligations.

Fourth, GASB Statement No. 27, Paragraph 36(f) states:

Annual required contributions of the employer(s) (ARC)—The ARC should be actuarially determined in accordance with the parameters [i.e. GAAP]. The amount should include the employer's normal cost and a provision(s) for amortizing the total unfunded actuarial accrued liability (unfunded actuarial liability) (emphasis in the original)

Paragraph 36(g) further clarifies:

Contribution deficiencies or excess contributions of the employer(s)—A contribution deficiency or excess contribution is the difference between the ARC for a given year and the employer's contributions in relation to the ARC. (emphasis in the original)

It is clear from its terms that 2 C.F.R. 220 is concerned with contribution deficiencies wherein the employer’s contribution’s related to the ARC are less than the ARC, which
results in not all costs being fully funded for all plan participants by yearend. That is situation in the instant case where the rate set by the Legislature is less than the ARC. This has the effect of increasing the UAAL, and therefore the ARC in future years to amortize the UAAL. 2 C.F.R. Part 220 requires that the Government not reimburse an entity for contribution deficiencies (i.e. costs not funded during the year) unless they are paid within six months of the end of that year. Since this information is only available from PERA’s books, the regulation must be referring to them, and not those of CSM. Indeed, the GASB noted when it issued Statement No. 68:

Each participating cost-sharing government [entity] will report its proportionate share of that cumulative net pension liability in their own accrual accounting-based financial statements [under GASB Statement No. 68]. This is significant because practically no information about an individual cost-sharing employer’s pension obligation has previously been reported in the financial statements. But under Statement 68, the employer’s proportionate share of the cumulative net pension liability will appear plainly on the face of the financial statements for the first time. (http://www.gasb.org/cs/ContentServer?c=Page&pagename=GASB%2FPage%2FGASBSectionPage&cid=1176160452263) (emphasis added)

Logically, if “practically no information about … pension obligations” (read costs) and their funding was required to be on CSM’s books as of 1994 (when Statement No. 27 was promulgated), 2 C.F.R. Part 220 (itself promulgated thereafter in 2005) could not be referring to them. Indeed, the Chair of the GASB dissented against Statement No. 27 because, amongst other things, it created very lax reporting standards at the entity level. We also note that when GASB Statement No. 68 goes into effect, CSM will be required to show its proportionate share of the unfunded pension costs on its own books at which point 2 C.F.R. Part 220 will apply regardless of which set of books are subject to the restrictions of 2 C.F.R. Part 220.

At bottom, we conclude that the use in the regulation of the term “cost” as opposed to “liability” and the phrase “all plan participates” (emphasis added) means that the regulation is concerned with the funding of the costs on PERA’s books, not the liabilities (if any) on CSM’s books.

As such, to be allowable CSM’s claimed pension expenses must represent current year payments (or payment made in the first six-months of the following year, effectively a grace period) assigned to current year costs. Any payment of prior year costs with current year funds (with the exception of the grace period) is prohibited by operation of 2 C.F.R. Part 220 because these payments are make-up payments for funding deficiencies in prior years. Therefore, we must next determine if any of CSM’s current year contributions are being assigned to prior year costs (with the exception of the grace period) in noncompliance with 2 C.F.R. Part 220.
To this end, we inquired of CSM as to its method for claiming pension expenses under Government awards. CSM’s Controller stated to us during the course of the Engagement that CSM includes pension expenses in its various fringe rates. He further stated that CSM calculates its fringe rates using the full amount of payments to PERA during a given fiscal year regardless of whether the cost assigned to that fiscal year was fully funded for all plan participants within six months of the end of the year.

We inspected CSM’s latest Disclosure Statement (Revision 01, Modification 01) to verify the answer to our inquiry. We also verified from our inspection of CSM’s accounting records during our incurred cost examination of FY 2012 and FY 2013 (DCAA Assignment No. 03121-2012J10100001) that the Controller’s statement was accurate, and that CSM claims all pension contributions paid to PERA in the year paid regardless of what year the costs were ultimately assigned by PERA in accordance with GAAP.

This line of inquiry led us to believe that CSM could be in noncompliance with 2 C.F.R. Part 220 insofar as CSM could be claiming pension contributions as a cost in its fringe pools even though those contributions funded pension costs assigned to prior periods more than six months after the end of those periods. To put it another way, CSM could be claiming as an expense under Government contracts unfunded pension costs, which is not allowable by the terms of 2 C.F.R. Part 220. Therefore, we performed additional procedures to ascertain whether CSM was in fact in noncompliance with 2 C.F.R. Part 220, Appendix A(j)(10)(f)(3)(a).

To begin, we determined that we would need evidence that the full amount of pension costs assigned to a fiscal year within the scope of this Engagement were not paid for all plan participants within the period specified by 2 C.F.R. Part 220. To this end, we inspected PERA’s FY 2012 Annual Report which states that PERA’s Unfunded Actuarial Accrued Liability (UAAL) for the State Division was $8,652,820,000. The reports for calendar years 2001 through 2012 and the projections for 2013 through 2014 as well as additional supporting documentation acquired directly from PERA state that the Actuarial Accrued Liability for each year between 2001 and 2012 was not fully by the end of that year. Adjusting the figures from PERA’s calendar year to CSM’s fiscal year (July 1 to June 30), we conclude that the costs assigned to each of FY 2001 through FY 2013 were not fully funded by the end of each year; and, based on PERA’s projections, fiscal years from FY 2014 onward are unlikely to be fully funded within the required timeframe for the foreseeable future. We verified with PERA that PERA does not assign any costs during the first six months of a fiscal year to the prior fiscal year. As such, the grace period does not apply to CSM.

Therefore, 2 C.F.R. Part 220, Appendix A(j)(10)(f)(3)(a) applies because “the cost assigned to a given fiscal year” is not “paid or funded for all plan participants within six months after the end of that year”. Therefore, we conclude that a portion of CSM’s claimed pension contributions for FY 2001 through FY 2013 and a portion of its proposed pension costs for FY 2014 onward are unallowable. As such, CSM did not comply with the cost allowability provisions of 2 C.F.R. Part 220.
Next we quantified the noncompliance. To this end, we requested and received directly from PERA an accounting from which we calculated the portion of CSM’s payments for a given fiscal year that were allocated to that fiscal year, and the portion allocated to prior years to reduce the UAAL (i.e. to make-up for contribution deficiencies in prior years). We determined that PERA was underfunded to such an extent that a significant and generally increasing portion of CSM’s annual contributions were actually being allocated to prior years to reduce the UAAL. At no point during the period did CSM’s contributions meet or exceed the ARC. Therefore, we conclude that the portion of CSM’s payments to PERA during a given fiscal year (since the grace period does not apply) that were assigned (“paid” or “funded”) to the year are allowable, while the portion of CSM’s payments to PERA that were assigned to prior fiscal years are unallowable.

PERA provided a breakdown of the percentage of contributions for FY 2001 – FY 2013 that were used to pay for prior period costs as noted above. The PERA letter was stated in terms of the portion of the rate for a given period that was used to pay for prior period costs.

For example, for the first six months FY 2012 PERA stated that 11.86% of eligible salaries were used to pay prior period costs. The total contribution rate for the period was 12.25%. Therefore, we calculated the percentage of unallowable costs as the rate paid for prior period costs (11.86%) divided by the total rate (12.25%) – which results in an unallowable amount of 96.82% for the period. We made the same calculation for each six-month period, and used simple averaging to arrive at an annualized amount. For the second six-months of FY 2012 we calculated the percentage of unallowable costs as the rate paid for prior period costs (12.71%) divided by the total rate (13.15%) – which results in an unallowable amount of 96.65% for the period. Averaging the two together, we arrive at a FY 2012 fiscal year unallowable rate of 96.73%. That number appears in the “% Unallowable” column below. The allowable cost rate is equal to one minus the unallowable cost rate (1 - .9673 = .0327). That amount appears in the “% Allowable” column below. We retrieved the total amount of claimed PERA costs for FY 2012 from CSM’s Permanent Files, and entered that amount in the “$ Claimed” column. The amount of allowable costs for the period is calculated by multiplying the “% Allowable” column by the “$ Claimed” column; and the amount of unallowable costs for the period is calculated by multiplying the “% Unallowable” column by the “$ Claimed” column. We repeated this calculation for each fiscal year from FY 2001 to FY 2013. We then calculated the total claimed costs, total allowable costs, and total unallowable costs. We calculated the percentage allowable and unallowable over the entire period. W/P C-02a
Therefore, we conclude that between FY 2001 and FY 2013 (July 1, 2000, to June 30, 2013) CSM improperly claimed $39,271,015 of pension costs deemed unallowable per 2 C.F.R. Part 220, Appendix A(J)(10)(f)(3)(a). CSM continues to bill the Government for 100% of its pension contributions, so it is in noncompliance for FY 2014 (the current fiscal year as of this date) as well.

As the University of Colorado system is also a participant in the State Division of PERA, it would appear to have the same noncompliance as CSM. Further, it is likely that other public institutions of higher education across the country in states with underfunded pension plans are in similar circumstances.

We also note that this noncompliance may also violate other rule and law. Specifically 31 U.S.C. §3729(a)(1)(A) states that any person who “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval” is liable to the United States government for a civil penalty and treble damages. Of interest here, 31 U.S.C. §3729(b)(1)(A) states that a person acts “knowingly” if he or she “(i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information”. Further 31 U.S.C. §3729(b)(1)(B) states that claims under this section “require no proof of specific intent to defraud”. Further, 31 U.S.C. §3729(b)(2)(A) defines a “claim” as “any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that […] (i) is presented to an officer, employee, or agent of the United States”. Therefore, you may wish to consider the possible violation of the False Claims Act when addressing this issue.

Finally, note that this document contains only a summary of the relevant facts, issues, analysis, and conclusions. If you have any questions or concerns in this matter, or require

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any assistance in your investigations (including further details), please do not hesitate to contact me. We request that you keep us informed as to the progress of your investigation(s) and notify us as to the outcome of such investigation(s) as that information becomes available.

(emphasis in the original where noted, other emphasis added)

Note: I have never received any communication (other than an automated email confirming receipt) of any kind from HHS-IG on this matter.

Note: This referral is substantively identical to the latest draft of the SOCAR as it existed at that time.

12 June 2014: While the engagement partner Mr. Jones is in Ecuador, Mr. McAfee and Ms. McKune overrule the CSM pension SOCARs in their entirety, and order Mr. Quant and Mr. Merchant (who is acting engagement partner) to remove the findings and issue unqualified opinions on all audits of CSM.

The email from DCAA Headquarters Policy Division (Ms. Jacque Hlavin) states:

As discussed this morning, here is our updated guidance.

(1) In assignment 3121-2014J19200003, DCAA should use paragraph 19 of GASB Statement 27 as their AT Section 601.40 criteria for the 2001 to 2013 periods and the related draft questioned costs totaling $39,271,015:

"Employers that participate in cost-sharing multiple-employer plans (cost-sharing employers) should recognize annual pension expenditures/expense equal to their contractually required contributions to the plan..."

(2) Once the amount of assignable pension costs is determined in accordance with paragraph 19 of GASB 27, the fourth criteria of section (J)10.f.(3)(a) of Circular A-21 is applicable:

"Costs of the institution's pension plan...are allowable, provided...(iv) the cost assigned to a given fiscal year is paid or funded for all plan participants within six months after the end of that year."

No explanation was provided as to why this decision was reached, and no response was made to the arguments made in the SOCAR approved by Mr. Jones before his departure (and included as part of the HHS-IG referral above) specifically rejecting this approach. Instead, Headquarters subordinated Mr. Jones’s judgement (in absentia) and concluded that his approved findings were incorrect with no explanation, and without Mr. Jones being present as the engagement partner to defend his position. Instead, Mr. Quant and Mr. Merchant (the acting engagement partner) was ordered to issue the reports in Mr. Jones’s name with all of the findings removed.
Ms. McKune stated in her email cover to the Headquarters “guidance” sent to Mr. McAfee:

I have coordinated with Policy on the Colorado School of Mines audit. As it relates to the Pension costs, I agree with Policy. The audit team should document the disagreement with my final decision in the working papers (in the folder provided as part of the APPS package) and incorporate my decision on the audit findings as discussed below:

(1) In assignment 3121-2014J19200003, DCAA should use paragraph 19 of GASB Statement 27 as their AT Section 601.40 criteria for the 2001 to 2013 periods and the related draft questioned costs totaling $39,271,015:

"Employers that participate in cost-sharing multiple-employer plans (cost-sharing employers) should recognize annual pension expenditures/expense equal to their contractually required contributions to the plan..."

(2) Once the amount of assignable pension costs is determined in accordance with paragraph 19 of GASB 27, the fourth criteria of section (J)10.f.(3)(a) of Circular A-21 is applicable:

"Costs of the institution's pension plan...are allowable, provided...(iv) the cost assigned to a given fiscal year is paid or funded for all plan participants within six months after the end of that year."

Please forward my decision to the Branch Manager and have him assure appropriate changes are made to the working paper package (i.e. documenting the disagreement of opinion in the appropriate folder and ensuring the working paper package supports the audit opinion). This report should be provided to the requestor as soon as possible to ensure they can meet the statutory date required for finalizing the rates.

(emphasis added)

No explanation was provided as to why Ms. McKune agreed with Policy; nor, again, did policy provide any explanation as to why the engagement partner’s position was incorrect.

Mr. McAfee stated in his own email cover to Ms. McKune’s ‘decision” and the Headquarters “guidance” sent to Mr. Quant:

The email below will serve as documentation of the DRD's final decision on the issues related to CSM pension costs and vacation and sick leave.

As summarized below, GASB 27 (applicable GAAP for CSM) would recognize pension expense paid in accordance with the legislature mandated contribution rates as the pension expense...
expense for each year. Then OMB Circular A-21 would limit the allowable amount to the amount of that legislature mandated contribution that was actually paid within the 18 month window. So, based on discussions we have had over the last few weeks, I believe that would result in no questioned pension expense.

... 

As the requester needs this report as soon as possible, please ensure the report and working papers are revised to be in consonance with the DRD's final decision. As mentioned below, the disagreement and this message should be documented in the appropriate folder within the APPS package.

No option was provided for any individual to resign from the engagement to avoid subordination of their judgement. Instead, Mr. McAfee ordered us to remove the pension findings, and change the opinions from adverse to unqualified before issuing the reports. This is the definition of subordination of judgement prohibited by GAGAS and the Code.

12 June 2014: I notified Ms. Janysak of the situation in an email:

Martha McKune just overruled the Denver FAO on another group of audits (Colorado School of Mines) -- again without adequate support or addressing the FAO's position in the draft results. As I have warned repeatedly against having Ms. McKune remain in a position of authority over my work due to the appearance of impropriety related to NEON to no avail, I consider this to be an act of bad faith -- not to mention a violation of GAGAS's evidence sufficiency standards. I am finalizing my resignation from each engagement as we speak, and have already reported the matter to the DoDIG and fully briefed the interested Congressional committees/subcommittees. This would appear to be strike 3 for DCAA (2008, NEON, and now CSM). I would also like to formally file a complaint with IRD on the GAGAS part of the matter, so please make yourself or one of your subordinates available to intake that complaint at the earliest opportunity.

(emphasis added)

12 June 2014: I complete a whistleblower disclosure to the DoDIG Hotline (No. 20140612110104532) and state:

This issue deals with several current audits of the Colorado School of Mines (“CSM”) under the DCAA Denver Branch Office. The Denver Branch determined that CSM was in substantive noncompliance with 2 CFR § 220 insofar as it was improperly charging a share of $39 million of expressly unallowable pension costs to the Government that were not funded in accordance with the requirements of that regulation (see the attached draft Statement of Conditions and Recommendations or “SOCAR” for further details). DCAA Central Region Regional Audit Manager Jerry McAfee with the explicit support of Deputy Regional Director Martha McKune ordered me to remove this audit finding from the audit report (see the email in text form attached hereto for the order).

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There are two substantive issues with this action by Ms. McKune and Mr. McAfee. First, both Ms. McKune and Mr. McAfee have been accused of improperly ordering the removal of audit findings from a previous audit earlier this year. That audit, of the National Ecological Observatory Network (“NEON”) has been the subject of several DoD Hotline complaints by me, and is the subject of active Congressional inquiries from at least two committees. Ms. McKune and Mr. McAfee are both aware of the accusations against them, and are aware that I am the source. Therefore, it is inappropriate for either Ms. McKune or Mr. McAfee to exercise supervisory authority over me, their accuser, or work that I and my office have performed. Yet, despite repeated requests, they have been allowed to remain in this position. Now they have taken the same action for which they were accused of misconduct again. Only this time the impact to the Government is millions of dollars – far greater than the dollar impact on the NEON audit.

Second, and most importantly, neither Ms. McKune or Mr. McAfee have articulated a valid reason for removing the audit findings from the CSM audit reports. Specifically, Ms. McKune and Mr. McAfee quote Governmental Accounting Standards Board (“GASB”) Statement No. 27 as provided by DCAA Headquarters in support of their position, but failed to respond to the specific and detailed arguments in the SOCAR addressing Statement No. 27 (again, see the attached SOCAR for more information). Therefore, they have ordered audit findings with a multi-million dollar impact to the taxpayer removed from an audit report without adequate support for that decision.

This appears to be a gross violation of Generally Accepted Government Auditing Standards’ requirement to have sufficient appropriate evidence to support audit decisions. It is also worthy of note that the audit finding applies to the University of Colorado System – but the impact is far greater at tens of millions of dollars. The finding also potentially applies to many other public institutions of higher education. The DCAA Penn State University office confirms that they have the same problem – but also for tens of millions of dollars or more. They too will be overruled by this decision. Therefore, it appears likely that hundreds of millions of dollars or more of unallowable costs across dozens of institutions will be permitted to stand under this decision.

Obviously that makes this a most serious issue, and I have already taken the extraordinary step of notifying the various oversight committees of the Congress and the United States Department of Health and Human Services (which oversees most public universities in the country) of the problem.

At bottom, the audit finding is correct and supported by sufficient appropriate evidence. It was removed without sufficient justification by the order of Ms. McKune and Mr. McAfee – and their improper action will cost the taxpayer millions in the form of improper and indeed illegal reimbursements for unfunded pension costs.

(emphasis added)
Note: the Congress was fully briefed on these developments.

13 June 2014: GAO responds to my independence concerns at DCAA and states in several emails:

I share your concerns about independence, especially within DCAA

...

[U]nfortunately, GAO doesn't really have any enforcement powers, so we aren't the people who can affect any changes at your agency. Per internal guidance, it seems that the best internal organization to address your concerns would be the DoD OIG

As I had already anticipated GAO’s suggestion and submitted a Hotline disclosure on 12 June, I sent DoDIG an addendum to that disclosure via email and stated:

This is a follow-up to a hotline complaint I submitted on 12 June 2014 (copy attached hereto). This email provides important additional information in support of that complaint.

The thrust of the complaint is that Defense Contract Audit Agency ("DCAA") Deputy Regional Director Martha McKune ordered well documented audit findings regarding Colorado School of Mines' ("CSM") pension costs removed from the CSM audit reports without sufficient appropriate evidence to support the removal order. The purpose of this missive is to further elaborate upon my claim that insufficient evidence was documented to support the removal.

Please also note that the draft audit findings were approved by my first and second line supervisors. Therefore, this is not removal of auditing findings by an immediate superior early in the audit process, but removal by MANAGEMENT after the audit results have already been approved by two layers of supervision.

In her written order (attached hereto in the form of an email), Ms. McKune stated that she "agree[s] with [DCAA Headquarters] Policy [Division]". However, she does not state WHY she agrees with policy. This is problematic for a couple of reasons. First, Generally Accepted Government Auditing Standards ("GAGAS") require that all auditors (which includes Ms. McKune) exercise independent and objective professional judgment. Nevertheless, Ms. McKune has not documented her reasoning for agreeing with Policy. Instead, she appears to simply accept their position without exercising her own independent judgment.

The Code of Professional Ethics (the "Code") of the American Institute of Certified Public Accountants ("AICPA") which applies to most … public accountants … further supports this position. The Code states that under no circumstances may an auditor subordinate his or her professional judgment to any other person. Yet, that is precisely what Ms. McKune has done here. Her official order makes no mention of

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exercising independent judgment; instead, she subordinates her judgment to Policy. This is a direct noncompliance with GAGAS and a violation of the Code.

However, the above would be somewhat mitigated if Policy laid out a well-articulated reason for disagreeing with the audit findings and provided sufficient appropriate evidence supporting the removal of the findings. This would not let Ms. McKune off the hook, but at least the final audit results would arguably be in compliant with GAGAS. Unfortunately, Policy provides NO justification for their position WHATSOEVER. Ms. Hlavin, the Policy Chief, states that Governmental Accounting Standards Board ("GASB") Statement No. 27, Paragraph 19 is the correct criteria for judging the pension costs through the lens of 2 CFR § 220. Ms. McKune then states that using that lens requires the removal of the auditing findings.

However, in the draft audit findings (attached hereto) we specifically address why 2 CFR § 220 does NOT refer to the liability on CSM's books (i.e. the "expense" discussed in Paragraph 19), but instead the cost on the books of the Colorado Public Employees' Retirement Association ("PERA") discussed elsewhere in GASB Statement No. 27. Policy makes no mention whatsoever of our arguments its interpretation of GASB Statement No. 27. Indeed, it is totally unresponsive to that line of argumentation. Instead, it simply asserts by administrative fiat that our position is incorrect.

This is NOT sufficient appropriate evidence under GAGAS. Instead, it is exactly the kind of unilateral action that GAGAS and the Code explicitly forbids; to wit, overriding the professional judgment of an auditor without sufficient justification.

It is worthy of note that even if Ms. McKune and Policy are CORRECT in their position (obviously I think they are wrong, but let us assume they are correct for purposes of this hypothetical), they have nevertheless violated GAGAS because they have failed to document sufficient appropriate evidence supporting their position. Ms. McKune makes clear in her email that the email is the official documentation of her position. Therefore, that email must contain sufficient documentation to support her position so that it can be placed in the audit file to explain why the audit findings were changed. No reasonable person would believe that the information provided in the email are sufficient, especially compared to the thorough and well-reasoned documentation in the draft auditing findings that are supported by sufficient appropriate evidence.

At bottom, Ms. McKune has improperly subordinated her judgment to the DCAA Headquarters (Policy Division) and has ordered the removal of material audit findings supported by sufficient appropriate evidence without ANY (much less sufficient) justification. Simply put, neither Ms. McKune nor DCAA Headquarters cites ANY authority for their position that GASB Statement No. 27, Paragraph 19 is the appropriate standard for judging CSM's pension costs. Not only is this a direct noncompliance with GAGAS and violation of the Code -- but (assuming that I am correct) it is also the concealment of material information (the existence of the pension cost noncompliance) in official Government audit reports (which now, by her order, will make...
no mention of the noncompliance). This is arguably criminal act under 18 U.S.C. § 1001 insofar as the final audit reports are false statements to the Government (since the reports go to a Government contracting officer).

The result is that $39 million of expressly unallowable pension costs will be allowed to CSM.

This cannot stand.

13 June 2014: Since Ms. Janysek did not get back to me, I forwarded her the DoDIG disclosure and stated:

This serves as my official complaint to IRD regarding an alleged violation of GAGAS in the below referenced audits of the Colorado School of Mines. As noted in my email on 12 June, please make yourself or a member of your staff available to officially intake this complaint at the earliest possible opportunity.

Ms. Janysek called me later on 13 June to discuss the matter, as well as other pending issues. I documented the conversation in an email to Ms. Janysek immediately afterwards as follows:

Thank you for discussing the subject issue with me today on the phone. Below is a recap of the major points:

First, DoDIG has completed its preliminary inquiry into the NEON engagement and has decided NOT to investigate anything related to that audit — either the alleged misconduct by DCAA officials, the improper ordering of the audit findings to be removed, or the alleged violations of GAGAS.

Second, DCAA legal has determined that no misconduct related to the NEON audit has occurred and no investigation will be opened by DCAA (including IRD) into the matter.

Third, regarding the CSM audit issues you will be speaking to DCAA Deputy Director Anita Bales about the need for DCAA Headquarters Policy Division to provide sufficient appropriate evidence supporting its position that the FAO's draft audit findings on the pension issue are incorrect as the lack of this evidence is a potential violation of GAGAS. I noted to you that the audit reports on CSM will be issued shortly, so if any changes are to be made it must be done quickly. I also noted that I am resigning from the CSM audits effective COB today due to the alleged misconduct and subordination of judgment issue in accordance with the Code of Professional [Conduct] of the American Institute of Certified Public Accountant …

Ms. Janysek responded:

First, you are correct that DoDIG and DCIS will not investigate anything related to the audit. They are providing all documentation received in their preliminary
analysis to DCAA IRD for further review. Regarding the alleged misconduct of Ms McKune, the DoDIG Investigations of Senior Officials, has determined there is no Senior Official misconduct.

Second, DCAA legal has not determined there is no misconduct related to the NEON audit; however, they have determined there is no perceived threat regarding Ms Bales.

Third, I will speak with Ms Bales regarding the information you provided concerning the alleged lack of sufficient appropriate evidence supporting its position that the FAO's draft audit findings on the pension issue are incorrect as the lack of this evidence is a potential violation of GAGAS. Ms Bales will make a decision regarding how she proceeds regarding that information.

To summarize: DoDIG handed all responsibility for investigation into NEON to IRD despite the fact that I had previously informed DoDIG that IRD was compromised when Ms. Janysek took on management responsibility related to the NEON engagement. Worse, DoDIG handed documentation regarding my accusations against Ms. Janysek, Ms. Bales, Mr. McKune, Ms. McAfee, Mr. Hoffman, Mr. Fitzgerald and others over to the very people that I was accusing of misconduct. This blatant violation of its duty as an inspector general practically begged for retaliation against me for my protected disclosures. I therefore place a great deal of the blame for the retaliation documented hereafter on DoDIG appalling and quite possibly illegal actions.

13 June 2014: I resign from the CSM engagements. Specifically on the pension cost issue I state:

I do not agree with the findings of this Engagement related to the pension costs. The draft SOCAR … is well-reasoned and supported by sufficient appropriate evidence.

The original audit findings is that the Colorado School of Mines (“CSM”) was in noncompliance with the pension funding requirements of 2 CFR § 220. Regional Audit Manager (“RAM”) Jerry McAfee disagreed and believed that no noncompliance had occurred because CSM paid “everything it was required to pay by Colorado law”. I argued in response that the law was concerned with funding the normal per the books of the Colorado Public Employees’ Retirement Association (“PERA”) not the liability on CSM's books. Further documentation of my reasoning is in the draft SOCAR. The matter was elevated to the Deputy Regional Director (“DRD”), Central Region who acted on the matter with the advice and consent of DCAA Headquarters, Policy Division. The DRD and Policy agreed with the RAM.

In her written order (attached hereto in the form of an email), Deputy Regional Director Martha McKune stated that she "agree[s] with [DCAA Headquarters] Policy [Division]" that the FAO is incorrect. However, she does not state why she agrees with Policy nor does she address any of the arguments made in the draft SOCAR.

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This is problematic because Generally Accepted Government Auditing Standards ("GAGAS") require that all auditors (which includes Ms. McKune) exercise independent and objective professional judgment. Nevertheless, Ms. McKune has not documented her reasoning for agreeing with Policy. Instead, she appears to simply accept their position without exercising her own independent judgment. The Code of Professional Ethics (the "Code") of the American Institute of Certified Public Accountants ("AICPA") which applies to most certified public accountants by the operation of state law, further supports this position. The Code states that under no circumstances may an auditor subordinate his or her professional judgment to any other person. Yet, that is precisely what Ms. McKune has done here. Her official order makes no mention of exercising independent judgment; instead, she subordinates her judgment to Policy. This is a direct noncompliance with GAGAS and a violation of the Code.

However, the above would be somewhat mitigated if Policy laid out a well-articulated reason for disagreeing with the audit findings and provided sufficient appropriate evidence supporting the removal of the findings. This would not let Ms. McKune off the hook, but at least the final audit results would arguably be in compliant with GAGAS. Unfortunately, Policy provides NO justification for their position whatsoever. Ms. Hlavin, the Policy Chief, states that Governmental Accounting Standards Board ("GASB") Statement No. 27, Paragraph 19 is the correct criteria for judging the pension costs through the lens of 2 CFR § 220. Ms. McKune then states that using that lens requires the removal of the auditing findings. However, in the draft SOCAR I specifically address why 2 CFR § 220 does not refer to the liability on CSM's books (i.e. the "expense" discussed in Paragraph 19), but instead the cost on the books of PERA discussed elsewhere in GASB Statement No. 27. Policy makes no mention whatsoever of my arguments its interpretation of GASB Statement No. 27. Indeed, it is totally unresponsive to that line of argumentation. Instead, it simply asserts by administrative fiat that my position is incorrect. This is NOT sufficient appropriate evidence under GAGAS. Instead, it is exactly the kind of unilateral action that GAGAS and the Code explicitly forbids; to wit, overriding the professional judgment of an auditor without sufficient justification.

It is worthy of note that even if Ms. McKune and Policy are correct in their position (obviously I think they are wrong, but let us assume they are correct for purposes of this hypothetical), they have nevertheless violated GAGAS because they have failed to document sufficient appropriate evidence supporting their position. Ms. McKune makes clear in her email that the email is the official documentation of her position. Therefore, that email must contain sufficient documentation to support her position so that it can be placed in the audit file to explain why the audit findings were changed. No reasonable person would

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believe that the information provided in the email are sufficient, especially compared to the thorough and well-reasoned documentation in the draft auditing findings that are supported by sufficient appropriate evidence.

At bottom, Ms. McKune has improperly subordinated her judgment to the DCAA Headquarters (Policy Division) and has ordered the removal of material audit findings supported by sufficient appropriate evidence without ANY (much less sufficient) justification. Simply put, neither Ms. McKune nor DCAA Headquarters cites ANY authority for their position that GASB Statement No. 27, Paragraph 19 is the appropriate standard for judging CSM's pension costs. Not only is this a direct noncompliance with GAGAS and violation of the Code -- but (assuming that I am correct) it is also the concealment of material information (the existence of the pension cost noncompliance) in official Government audit reports (which now, by her order, will make no mention of the noncompliance). This is arguably criminal act under 18 U.S.C. § 1001 insofar as the final audit reports are false statements to the Government (since the reports go to a Government contracting officer).

The result is that $39 million of expressly unallowable pension costs will illegally allowed to CSM.

This cannot stand.

Therefore, I believe that the final audit findings related to these two issues are materially false and misleading and render the final audit report materially false and misleading. Under the Code of Professional Ethics of the American Institute of Certified Public Accountants (to which I am bound by Colorado law), I cannot sign a document that I believe to be false or misleading, nor can I subordinate my judgment to any other. Further participation or the signing off on the audit findings (or lack thereof) would violate this principle. No safeguards can compensate for the magnitude of the falsity of the report.

Therefore, I tender my resignation from the Engagement effective Friday 13 June 2014 in order to avoid participation in a false report and subordination of my professional judgment.

Mr. Jones was unable to document his own disagreement as engagement partner because the report was issue before he returned from Ecuador.

16 June 2014: Mr. Quant informs me via email that he, I and Mr. Jones have been summoned to the Northeastern Region headquarters in Boston, MA on 26 June to attend a “meeting regarding the NEON opinion”.

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16 June 2014: Based on a conversation with Mr. Quant, I wrote to the Congress and stated:

I … wanted to let you know that it is my understanding that the decision on the NEON audit has already been made by DCAA Director Patrick Fitzgerald. The meeting in Boston will only be to communicate that decision, not to have any influence over it. I am not sure what the point of flying a bunch of Federal employees to Boston on the taxpayers dime (and there are seven of us going from Central Region alone) to tell us about a decision that has already been made is, but there you go. It was my understanding that there would actually be some discussion of the audit following the Northeastern Region review, but that no longer appears to be the case. Northeastern Region also never discussed the audit with anyone on the local audit team at all, which is awfully strange. Finally, DCAA Headquarters has declined to tell me what the decision is until the meeting (not sure what their reasoning is for that) …

(emphasis added)

18 June 2014: I write to Ms. Janysek and state:

I am told that a meeting regarding NEON will be taking place at the Northeastern Region office in Boston on June 26. I am further told that a decision about NEON has already been made, and the purpose of the meeting will be limited to communicating that decision to the audit team personnel from the Denver Branch Office. As this contradicts your prior statements that a meeting would be held to make the decision, it appears that some clarification is needed. Right now I am confused as to 1) why a decision was made unilaterally without the previously planned discussion; 2) why that decision has not been communicated to me; 3) why taxpayer money is being spent to send seven Government employees to NER from the Central Region if the decision has already been made; and, 4) who made the final decision.

Please clarify the above at your first opportunity.

20 June 2014: Mr. Martin at DCAA Headquarters Policy responds to my concerns regarding the CSM engagements. In that email he states:

Please note that the Agency has a process for getting technical advice to the auditors and if the FAO needs more information in the future, we need to use that process so we can make sure everyone has the same information and that we are able to come to one Agency position.

(emphasis added)

Mr. Martin’s statement, which is consistent with the facts above and below, implies that it is DCAA’s policy to subordinate the judgement of all auditors to DCAA management and only have one Agency position on every accounting issue. Thus, as a matter of policy, DCAA does
not permit its auditors or engagement partners to exercise individual professional judgement if that judgement conflicts with Headquarters. **This is simply not permissible under GAGAS and the Code.**

26 June 2014: The Northeastern Region overrules the NEON audit on 95% of the findings, including the critical finding related to the management fee. I summarize the decision in an email to the Congress as follows:

The decision meeting on the NEON audit took place today. **On the issue pertinent here - the use of "fee" to pay unallowable costs -- the official position of the Defense Contract Audit Agency is that the practice is permissible and the audit is overruled.** I have not been given a digital copy of the official signed decision (I have seen a hardcopy), but I will sent it on as soon as I receive it. DCAA Northeastern Region determined that because the NSF designates the payments as "fee" in the grant agreement, its determination must be respected by DCAA. Since NSF declares the amounts to be fee, NEON can spend them on whatever it wants (including, as pertinent here, French hotels, alcohol, Christmas parties, etc.). It can even spend them on lobbying because apparently "fees" are not considered "federal funds" that are "appropriated" per the Byrd Amendment. In short, DCAA's position is that it is irrelevant whether the "fee" shares any of the characteristics of fees, only that NSF designates them a "fee" in the grant agreements. By doing so, it is free to spend the taxpayer funds so designated any anything it desires without any restriction whatsoever.

This is cannot be lawful.

DCAA is an independent audit agency. We are required by law to maintain independence from both the Government and the contractors/grantees. Yet, we have accepted NSF's 'word' that the amounts are "fees" even though the audit clearly shows that they are reimbursements in the GUIS of fees. Basically, DCAA's ruling means that any contractor/grantee can convince the grants/contracting officer to give them a "fee" will not have any unreimbursed unallowable costs because the contractor/grantee can just bill their unallowable costs to the sham "fee". While this practice is apparently unique to grants and contracts with nonprofits, it is nevertheless causing millions of dollars of taxpayer money to be paid to contractors and grantees like NEON to spend on French château's and the like. **This is a violation of the spirit and the letter of the law and appears to by systematic across most or all grants to and contracts with nonprofits by the Federal Government.**

I repeatedly asked on the record during the meeting today whether DCAA had ANY evidence to support its position that the "fees" were actually fees (rather than reimbursements of cost as asserted in the audit) OTHER than the NSF and NEON say that they are. DCAA Deputy Regional Director (NE Region) William "Bill" Adie (who made the 'official' decision on the matter at the behest of DCAA Director Patrick Fitzgerald)
stated unequivocally that the sole reason for the decision was that the grant agreement written by NSF and accepted by NEON designates the amounts as "fee".

Obviously, this is a problem. The primary audit watchdog for the executive branch has officially and explicitly sanctioned the practice of permitting nonprofits to evade the cost allowability provision of rule and law using sham "fees". In doing so, DCAA has not only officially sanctioned an illegal act (the de facto reimbursement of unallowable costs); it has also hopelessly compromised its independence by accepting the position of another Federal agency despite the fact that all of the evidence in the record contradicts that position.

Therefore, there are two issues for the Congress's attention. First, the unlawful use of "fees" as a method of unlawfully evading the cost allowability provisions of rule and law by the NSF (and, apparently, most or all of the rest of the executive acquisition/grant agencies); and, second, DCAA's improper removal of the NEON "management fee" audit findings based on the 'word' of NSF in the face of overwhelming factual evidence to the contrary.

My position on this matter as articulated above strongly supports my 20 April disclosure, wherein I determine that DCAA is not independent of its Government “clients” like the NSF. While that disclosure addresses the fundamental independence impairments at DCAA, it references the NEON (and CSM) engagements as examples of where those impairments lead to actual audit misconduct. In effect, NEON is the example that proves that DCAA is not independent of its Government clients as required by GAGAS and the Code.

27 June 2014: I make a whistleblower disclosure (No. 20140627115641782) to the DoDIG Hotling on the matter above and state:

This submission relates to a number of other submissions regarding the Defense Contract Audit Agency’s (“DCAA”) audit of the National Ecological Observatory Network (“NEON”) of Boulder, Colorado. NEON is a National Science Foundation (“NSF”) grantee. This submission is an integral part of those various submissions and should be read in that context. This submission assumes familiarity with the facts detailed in those other submissions, and many basic facts already detailed are not repeated here.

To briefly recap: DCAA conducted an audit of NEON’s accounting system in 2013. That audit found that NEON was receiving reimbursement for expressly unallowable costs (including lobbying, Christmas parties, alcohol, stays in French hotels, and the like) in the guise of a “management fee”. Specific evidence was acquired and documented including the following critical pieces of information: 1) the initial grant agreement in 2008 had no provision for a fee; 2) at the end of 2008, NEON requested a fee PRECISELY equal to the amount of its 2008 unallowable costs (NEON specifically stated that it was requesting money for “unallowable” costs); 3) NEON actually received a “management fee” for 2008 equal to its unallowable costs and the grant was modified by NSF to reflect this fact; 4) a
“management fee” was permitted for all future years on the grant and was also provided for in future grants; 5) between 2008 and 2013 NEON spent the “fee” solely on costs that it admits, in writing, are unallowable; 6) NEON employees are instructed in NEON’s written policies and procedures to bill all unallowable costs to the “fee” account – a form is even provided for that purpose; 7) NEON receives direct reimbursement for its unallowable costs as they are incurred – however, rather than billing those costs directly to a grant, NEON bills the costs to a fictitious grant “990-9” when it requests reimbursement from the NSF – all charges to “990-9” are then routed back onto the individual grants as a “fee”; 8) the “fee” has none of the characteristics of a fee (other than the fact that it is called a “fee”) and all of the characteristics of a reimbursement; and, 9) to date NEON has received 100% reimbursement from the Government for all of its unallowable costs.

Based on these documented facts, I determined that NEON had received reimbursement for unallowable costs in contravention of 2 CFR § 230. I further determined that it was likely that NEON and the NSF were guilty of defrauding the United States Government by knowingly (actual knowledge by both parties is proven by the 2008 letter between NEON and the NSF) evading the restrictions against the reimbursement of certain (read “unallowable”) costs mandated by 2 CFR § 230 by using the sham “fee” to permit NEON to directly receive Government money for unallowable costs as those costs were incurred.

My initial audit findings were reviewed and approved by two layers of DCAA Management – first by Supervisory Auditor (GS-13) Michael Quant, and again by Field Audit Office Manager Allen Jones (GS-14). An independent review was also made by Field Audit Office Assistant for [Audit] Quality Angie Vail (GS-13). Ms. Vail also concurred with the findings.

Subsequent to the above, Regional Audit Manager Jerry McAfee disagreed with the findings and stated that the “fee” was a bona fide fee, and was therefore permissible. In accordance with the DCAA policy on resolving audit disagreements, the issue was elevated to Deputy Regional Director (Central Region) Martha McKune (SES). Ms. McKune agreed with Mr. McAfee and overruled the audit. However, Ms. McKune provided no written or verbal justification for her order.

Therefore, I protested the order to the Director, DCAA Patrick Fitzgerald (SES). Mr. Fitzgerald ordered the audit to be reviewed by the Northeastern Region. Th Northeastern Region Deputy Regional Director William "Bill" Adie (SES) reviewed the file on concurred with Ms. McKune on 26 June. Mr. Adie stated that it was the official decision of the Defense Contract Audit Agency that the “fee” would be respected as such SOLELY because the “fee” was designated as such in the cooperative agreement grants between the NSF and NEON. Mr. Adie declined to address any of the evidence that the “fee” was actually a sham, nor any of the evidence that the NSF was arguably culpable in the scheme, and instead stated that DCAA would not contradict the NSF’s designation of the payments as “fee”.

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This decision is unlawful for several reasons.

First, the Defense Contract Audit Agency is required to comply with Generally Accepted Government Auditing Standards (“GAGAS”). Explicit in GAGAS are requirements for DCAA to exercise independent and objective professional judgment when performing audits. In the case above, DCAA did NOT exercise independent judgment. Instead, DCAA accepted the position of the NSF that the payments were “fees” rather than reimbursements with absolutely no evidence to support that position. **In effect, DCAA accepted a 3rd party assertion without making any attempt to verify its veracity.**

Worse, DCAA utterly ignored the extensive evidence gathered by the audit team that leads to the opposite conclusion; to wit, that the “fees” are actually unlawful reimbursement of unallowable costs. Second, DCAA auditors are, for the most part, bound by the Code of Professional Ethics (the “Code”) of the American Institute of Certified Public Accountants (“AICPA”) when performing auditing work if they are a … Public Accountant …, a subordinate (directly or indirectly) of a [public accountant], or can be influenced by a [public accountant].

The Code prohibits the “subordination of judgment” of any person performing audit work to any other person. Subordination of judgment is defined as permitting one’s own judgment to be overridden by another, causing one to agree with the other party without sufficient cause. **Because DCAA agreed with the NSF’s judgment (as documented in the grant agreements) that the “fee” was a bona fide fee without making any attempt to verify that assertion and indeed in the face of overwhelming evidence to the contrary, DCAA subordinated its judgment to the NSF.**

Third, DCAA is required by rule, law and GAGAS to be functionally independent of the rest of the Federal Government. By subordinating its judgment to the NSF and accepting the NSF’s position that the “fee” is bona fide without any documented evidence (and, in fact, evidence to the contrary), **DCAA has compromised its independence vis-à-vis the NSF. DCAA is therefore in violation of the requirements in rule, law and GAGAS that it be functionally independent from the rest of the Federal Government.**

At bottom, DCAA has made an official decision to permit NEON to receive public money to pay costs that everyone, including the NSF and NEON, agree are unallowable SOLELY on the NSF’s bald assertion that the payments are “fees” rather than reimbursements. This is an illegal and unethical act by DCAA and is also noncompliant with GAGAS. Furthermore, the decision contains a materially false statement (that the amounts are “fees” and therefore lawful) in arguable violation of 18 U.S.C. § 1001. It might also be characterized as conspiracy to defraud the United States Government since by its actions DCAA will permit NEON to defraud the Government by receiving illegal reimbursements.
Finally, by its actions DCAA has permitted NEON to submit false claims for payment to the Federal Government, and NEON has in fact received payment for the same.

AS THIS IS JUST A SUMMARY, I NOTE THAT DODIG WILL NOT BE ABLE TO MAKE AN ACCURATE ASSESSMENT OF THE VERACITY OF THIS REPORT WITHOUT DISCUSSING THE MATTER WITH ME DIRECTLY AND PERMITTING ME TO ANSWER ANY QUESTIONS AND PROVIDE ADDITIONAL EVIDENCE.

(emphasis added)

Note: DoDIG never followed up with me on this matter or, indeed, discussed it with me at all. I received no communication with DoDIG related to this complaint whatsoever.

26-30 June 2014: I provide the information above to the Congress. Multiple members and committees express outrage that DCAA has effectually permitted Government grantees and contractors to spend taxpayer money on alcohol, parties, and lobbying – amongst other unlawful expenditures. Multiple Congressional inquiries and investigations are announced.

30 June 2014: DCAA Director Fitzgerald announces that he is resigning (retiring) from DCAA effective 31 August 2014, with no previous warning. Note: Whether his retirement was prompted by the coming Congressional storm is unknown, but the timing is striking.

2 July 2014: I write to the Congress and note that the Northeastern Region decision directly contradicts the 2012 DCAA audit of NEON (Engagement No. 03121-2012J121000001). I state:

I have attached DCAA's proposal audit of NEON from 2012. You will note that we determined at that time that the "management fee" was just unallowable costs (see Page 30 of the Report) -- that report was issued in 2012 and is still considered valid. DCAA Headquarters has not provided a justification for having two contradictory audit reports -- the proposal audit saying the management fee is unallowable, and the decision saying it is a bona fide fee and, therefore, allowable.

The 2012 report states:

We questioned one line item totaling $1,875,000 because it will be used to cover expressly unallowable cost. NEON proposed $375,000 for a yearly management fee for five years, stating “The need for discretionary funds to cover potential expenses deemed to be “unallowable” under OMB A-122, was not addressed in the early years of NEON. Due to restrictions placed upon NEON’s only source of non-federal funds, membership dues, NEON has no source of funding for necessary or unavoidable “unallowable” expenditures. Through discussions with NSF in late 2008 it was decided to include a line item in the NEON Construction budget proposal for a NEON Management Fee to cover these types of expenses.” Since it is NEON’s intent to cover unallowable cost with the requested funds, NEON is not compliant with 2 CFR Part 230 Appendix A, General Principles,
Section A.2b, Factors affecting allowability of costs, which states that "...To be allowable under an award, costs must meet the following general criteria:...conform to any limitations or exclusions set forth in these principles". Therefore, we questioned the entire proposed management fee as unallowable cost.

Note: DCAA has not rescinded this report. Therefore, there are at this moment two DCAA reports on exactly the same issue (management fees) at exactly the same grantee, for the same time period, but coming to exactly opposite conclusions. This is simply mindboggling.

Note: over the next several week significant Congressional activity related to the NEON engagement occurs eventually leading to the formal investigations detailed below.

29 July 2014: Mr. Andrew Aloush and Mr. Mark Dixon at DoDIG request a briefing by telephone on my disclosures related to the CSM engagements, which I provide.

29 July 2014: Mr. Quant states to me that he does not believe that I should be discussing the NEON and CSM engagements with the Congress, especially on official time. Mr. Quant then states verbally:

It’s not that I don’t agree with you [on NEON and CSM], because I do. But Angie [Vaill] and I want to get promoted again, so we cannot afford to antagonize [Central] Region and Headquarters.

This is an extraordinary statement to make. Mr. Quant is stating that he is deliberately failing to support me, his subordinate, because he is afraid that adverse employment action will be taken against him if he does so. This also explains his actions on the timekeeping issue and hat-gate as explained above. Indeed, in context and given his later actions towards me (such as marking down my performance evaluation), and Mr. Jones’s comments later, it is apparent that Mr. Quant has been intimidated into becoming the agent through which senior DCAA management retaliates against me.

29 July 2014: I notified the Congress regarding Mr. Quant’s statements and noted:

I wanted to let you know that my immediate supervisors have expressed concerns regarding me spending work time on answering questions from Congressional staff, yourself included. DCAA has already been notified in writing by Senator Grassley that any interference in a Congressional inquiry is unlawful. Obviously Federal employees have to be free to cooperate with the Congress during working hours on issues related to their official duties (as this issue most certainly is), as opposed to purely private issues that are not related to their job duties. Nevertheless, my superiors have stated that I am acting as a "concerned citizen" and not pursuant to my official duties, and appear prepared to order me not to discuss anything with Congress during working hours. That position would effectively prohibit most Federal employees, myself included, from cooperating with the Congress (who also works during 'normal working hours') unless they took leave.
from work (which would not doubt chill the willingness of most Federal employees to cooperate, as they tend to guard their leave time quite jealously).

(emphasis added)

6 August 2014: I am informed by Mr. Jones that my entire team is being forcibly transferred to the Rocky Mountain Branch Office, depriving Mr. Jones of all of his mobile field auditors. Mr. Quant is being transferred to the Lockheed Martin Space Systems Sub-Office. I notify the Congress as follows:

I wanted to let you know that both myself and my entire team (Team "J") at DCAA have been transferred from the Denver Branch Office (FAO 03121) to the Rocky Mountain Branch Office (FAO 03151) at DCAA effective on 1 October. While physically this is merely a move across the hall, it has major retaliatory implications related to the NEON and CSM audits that I want to bring to your attention.

As you know, right now my immediate supervisor is Michael Quant, and his supervisor (my second line manager) is Allen Jones. Both Mike and Allen were in complete agreement with the audit findings for both NEON and CSM. However, Mike is scheduled to make a routine rotation to Lockheed Martin, which means a new supervisor will be brought in to oversee my team. Now with this transfer not only will I have a new supervisor, but I will also have a new manager. Nevertheless, Regional Audit Manager Jerry McAfee and Deputy Regional Director Martha McKune (who stand accused of misconduct in both the NEON and CSM engagements) remain my third and fourth level managers respectively. The effect of this transfer is to remove me from Allen's chain of command and the support he has provided on the NEON and CSM issues. My new branch manager is unlikely to be as cooperative especially because, unlike Allen, he is not close to retiring and therefore still must pay homage to Mr. McAfee and Ms. McKune.

This transfer could be explained away as a routine staffing matter; after all, the whole team is being moved (not just me), and there is a staffing disparity between the Denver and Rocky Mountain branches that would justify removing auditors from the former and adding them to the latter. However, several facts lead me to conclude that the transfer could be retaliatory in nature and designed to constrict the channels of communication between myself and the Congress, further interfere in my audits, and frustrate good governance.

First, Allen stated to the team that the transfer was personally ordered by DRD McKune. You will recall that I have repeatedly stated to DCAA Headquarters and the DCAA Central Region Director Diana Graff that Ms. McKune should be removed from my chain of command to avoid the appearance of impropriety since I have accused her of misconduct, and she is fully aware of the accusations. Those requests have been flatly refused, leaving me with little choice but to conclude that this action by Ms. McKune has at LEAST the appearance of impropriety.
Second, this move removes me from the office with cognizance over the NEON engagement. That means that my access to the NEON documentation, which besides in the Denver Branch permanent files, will be cut off as Rocky Mountain Branch employees have no access to the Denver Branch perm files. This means that I may be unable to answer Congressional inquiries regarding NEON.

Third, this leaves the Denver Branch entirely without a mobile team. Allen will now have two contractors -- Lockheed Martin and Ball Corporation. Both are on opposite ends of Denver from each other. He will now have no auditors sitting in the physical branch office at all. This is sufficiently unusual (it could indeed be considered retaliation against him) to call into question the propriety of the entire transfer, especially when combined with the other issues above and below.

Fourth, once at the Rocky Mountain Branch, I can be reassigned virtually anywhere without any input into the matter. Thus, DCAA could send me to an unfavorable duty station further away from my home as form of retaliation and there is absolutely nothing I could do about it.

Fifth, the transfer was ordered over Allen's objections and no member of my team was consulted before the order was issued. Again, this is sufficiently unusual to warrant attention.

Sixth and finally, the order was not made in writing and no advance notice was provided by DRD McKune. Instead, the entire team was told verbally by Allen that the transfer had been ordered earlier this week. At some point there will have to be formal paperwork, but for now everything is off-book.

When the above is taken in the aggregate, it appears obvious that the forced transfer has at least the appearance of impropriety, if for no other reason than Ms. McKune ordered it (which, again, is why I requested she be removed -- because ANY negative action she takes will at least appear to be retaliatory in light of the accusations I have made against her). It could indeed rise to the level of outright retaliation for my actions on the NEON and CSM audits (such as reporting the matters to the DoDIG and the Congress). I think it would be a bad precedent to permit DCAA to forcibly transfer auditors who bring Congress's attention to possible misconduct, and is likely to have a chilling effect on the willingness of other auditors to do the same -- especially as the transfer is now public knowledge in the office, and I think everyone will quickly connect the dots (i.e. I stand up to pressure from Region and Headquarters on audit findings being improperly removed, and then I find myself forcibly transferred).

Therefore, I draw your attention to the matter.

(emphasis added)

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6 August 2014: I receive my annual performance evaluation. I am downgraded from “Exceeds Fully Successful” (my grade in 2012-2013) to “Fully Successful” by Mr. Quant. Mr. Quant states in the written evaluation:

He does not always act in a professional manner with other DCAA staff, particularly those at the regional office.

He continues to make negative comments about DCAA which have an adverse impact on the team.

He does a good job of researching Government regulations, however he does not always interpret and apply them correctly.

He has difficulty meeting due dates because he gets preoccupied with other matters.

All of these statements are highly questionable. The first statement lacks any support and appears to be designed to undermine my disclosures alleging wrongdoing by Mr. McAfee, Ms. McKune and Ms. Graff. The second is both a violation of my First Amendment right to free speech, and a direct reference to my disclosures of wrongdoing. The third lacks any support, and is based solely on DCAA management’s determinations in the NEON and CSM cases. The fourth is a direct reference to me spending time addressing the NEON and CSM engagements and related whistleblower disclosures with the Congress and inspectors general.

In the context of Mr. Quant statement that he will not support me because he “wants to get promoted again” only a week earlier and Mr. Jones’s statement below regarding Mr. McAfee ordering him to downgrade my performance evaluation in retaliation for the NEON engagement and associated disclosures, it is apparent that Mr. Quant downgraded my performance evaluation based on instructions (rather explicit or by implication) of DCAA management, rather than my actual performance. To put it another way, Mr. Quant’s decision to downgrade my performance was materially influenced by my whistleblower disclosures on the NEON (and, presumably, CSM) engagements and my reporting the alleged retaliation related to the same.

5 U.S.C. § 2302(b) states:

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) any violation of any law, rule, or regulation, or
(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

   (i) any violation (other than a violation of this section) of any law, rule, or regulation, or

   (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

   (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—

       (i) with regard to remedying a violation of paragraph (8); or

       (ii) other than with regard to remedying a violation of paragraph (8);

   (B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii);

   (C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

   (D) for refusing to obey an order that would require the individual to violate a law;

5 U.S.C. § 2302(a)(2) defines a personnel practice as:

   …

   (viii) a performance evaluation

   …

   (xii) any other significant change in duties, responsibilities, or working conditions;

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Given the information above and below, as well as the close temporal relationship between the disclosures in June and July 2014 and the transfer and performance evaluation in August 2014, it appears that the downgrade on the performance evaluation and the transfer were motivated, at least materially and in part, by the disclosures. Certainly Mr. Quant's comments above and Mr. Jones's below make it clear that DCAA management intended to 'punish' me (and apparently Mr. Jones) for our actions on the NEON engagement, including – specifically – my whistleblower disclosures to the DoDIG, NSF-IG, HHS-IG, the GAO and the Congress.

Therefore, is appears that Mr. Quant did commit a prohibited personnel practice (the performance evaluation) and Ms. McKune another (the transfer, which involved a completely new supervisor and engagement partner – undoubtedly a “sufficient change in … working conditions”) related to the NEOn and CSM whistleblower disclosures in direct violation of the Whistleblower Protection Act (5 U.S.C. § 2302).

6 August 2014: I discuss my performance evaluation with Mr. Jones. Mr. Jones states that Mr. McAfee ordered him to downgrade the performance evaluations of myself, Mr. Quant, and Ms. Vaill – or suffer a downgrade himself. He stated that he refused to downgrade me, and was downgraded in turn. He further stated that he had filed a prohibited personnel practice complaint with IRD due to his own downgrade.

I immediately wrote an email to the Congress outlining my concerns:

I just received my performance evaluation for the past year, which I wanted to provide to you all (see attached). While I received a "fully successful" rating -- this is a significant step down from my performance rating last year -- apparently because of direct pressure from DCAA Central Region and Headquarters management on my supervisor and FAO Manager. Of further concern, there are a large number of negative comments that can only refer to my interactions with the Congress. For example:

"He has difficulty meeting due dates because he gets preoccupied with other matters."

"... because he tends to go off topic, his reports are generally not submitted in time to allow management review before the required due dates."

"... however at times gets sidetracked and does not perform his assigned work."

I asked to what my supervisor was referring, and the answer was my communication and the time taken to address the NEON/CSM issues with the Congress and the IG. Obviously, that is improper. Government employees should not and indeed cannot be punished for protected communications and encouraged not to make them -- and that is clearly what occurred here.
I am also concerned with the note that: "He does a good job of researching Government regulations, however he does not always interpret and apply them correctly." I asked to what this sentence referred, and my supervisor responded that my interpretation of the regulations under NEON and CSM was "incorrect" because DCAA Headquarters disagreed with my interpretation. Given that there is serious doubt whether DCAA Headquarters properly interpreted the law, I am rather concerned to see a direct attack on my professional competence appear in my performance evaluation.

The same thing goes for "He does not always act in a professional manner with other DCAA staff, particularly those at the regional office." If by 'not acting in a professional manner' the evaluation is referring to my belief that regional office staff committed criminal acts by removing audit findings from approved reports, and my accusations to the DoDIG and the Congress to the same, that is an accurate statement. However, it is very concerning that accusations of misconduct (which have, at least officially, not been disproven) against senior officials is considered acting in an unprofessional manner, and has a negative effect on one's performance evaluation.

I am also equally concerned with the phrase: "He continues to make negative comments about DCAA which have an adverse impact on the team." I asked for clarification and was told that my calling out the Agency to Congress and making comments to the Congress and others to the affect that DCAA improperly handled the NEON and CSM audits. First Amendment implications aside, I do not think that the Congress wants DCAA employees to be pressured against openly making disclosures to the Congress and the IG and standing by their actions.

Finally, and most concerning -- I discussed my performance evaluation with my FAO Manager Allen Jones after discussing it with my immediate supervisor. Allen stated that Regional Audit Manager Jerry McAfee instructed him to 'hold me accountable' for the NEON audit. Specifically, Mr. McAfee stated that we did not perform the NEON audit in accordance with GAGAS (as evidenced by the fact that we were overruled by Headquarters), and therefore we should be downgraded. Mr. Jones stated that he refused to do so, arguing that NEON was technically in the prior performance rating period, and also that the audit WAS conducted in accordance with GAGAS, Headquarters simply disagreed with the results because they were politically inconvenient. Mr. McAfee implied that Mr. Jones's own evaluation would be impacted by NEON as Mr. McAfee prepares it directly. Mr. McAfee stated that he was acting not only in accordance with his own inclinations on the matter, but on the direct orders of Deputy Regional Director Martha McKune and Regional Director Diana Graff.

Given that facts above, this appears to be a clear-cut case of retaliation. However -- having dealt with DoDIG and the Office of the Special Counsel on retaliation issues before, I can

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state with absolute conviction that they are utterly worthless at whistleblower protection. Unless someone is stupid enough to outright state in writing that they are retaliating, or otherwise do something very blatant/stupid -- DoDIG and the OSC are useless. Unfortunately, neither Region nor Headquarters has put anything sufficiently damning in writing to prompt DoDIG or OSC action.

…

[I]f DCAA is allowed to intimidate and retaliate against its auditors so openly (and everyone in the office is aware that I am persona non grata with Region and Headquarters at this point) without suffering any consequences – fewer and fewer auditors are going to be willing to step forward, as I have, and do the right thing by informing the IG and Congress of wrongdoing by DCAA or by contractors/contracting officers. In light of this fact, I draw your attention to the above and suggest that Congressional ire should be brought against those responsible. Otherwise, DCAA auditors are very unlikely to be willing to become whistleblowers in the future having seen what has happened and continues to happen to me as a result of my own whistleblower disclosures.

(emphasis added)

21 August 2014: DoDIG completes its peer review of DCAA as required by GAGAS. DCAA passes the review with a deficiency related to audit documentation. No mention is made of the independence issues or issues related to the NEON and CSM engagements previously communicated to DoDIG, even though all of those issues were within the penumbra of the peer review. DoDIG’s actions can only be construed as either shocking incompetence, or deliberate ignorance. In either case, the best chance to address these issues was not taken because DoDIG failed to exercise even the most rudimentary audit integrity oversight authority related to these issues. Given the lack of independence between DoD and DCAA cited in my 20 April disclosure, DoDIG’s actions may be explained by their own self-interest in not questioning the competence, independence, integrity and objectivity DoD’s primary audit agency, even when such questions are fully justified by the facts.

Shockingly, the DoDIG peer review report only mentioned the word “independence” a single time (in relation to the 2009 GAO report) even though independence is perhaps the most important professional standard for auditors. Indeed, GAGAS 3.100 states:

The peer review team should prepare one or more written reports communicating the results of the peer review, including the following:

…

(b) an opinion on whether the system of quality control of the reviewed audit organization’s audit practices was adequately designed and complied with during the period reviewed to
provide the audit organization with reasonable assurance of conforming with applicable professional standards

(emphasis added)

Therefore, based on the peer review report, DoDIG failed to document in its peer review report any conclusion related to DCAA’s quality control related to independence. This is truly hideous incompetence, especially as independence is noted by DoDIG as a known risk because of the 2009 GAO report. Therefore, DoDIG’s failure to even mention independence in this peer review report (other than the reference to the 2009 GAO report) calls into question the entire peer review report. Indeed, there is little doubt that DoDIG’s failure to properly document its evaluation of DCAA’s independence in its report renders the peer review noncompliance with GAGAS and, thus invalid.

Given my 20 April disclosure regarding DCAA’s independence, serious questions exist about whether DCAA is independent of either the Government entities that hire it (our “clients”) or the contractors and grantees that we audit (also our “clients”).

3 September 2014: Senators Grassley and Paul send joint public letters to NEON and the NSF demanding information related to the use of management fees to pay unallowable costs like alcohol, lobbying and parties. They state:

A whistleblower has provided information to us regarding a draft audit performed by the Defense Contract Audit Agency (DCAA) of The National Ecological Observatory Network (NEON).

The whistleblower in question was, of course, me. A copy of the NSF letter (substantively identical to the NEON letter) is below:

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September 3, 2014

Dr. France A. Córdova
Director
National Science Foundation
4201 Wilson Blvd.
Arlington, VA 22230

Dr. Daniel E. Arvizu
Chairman
National Science Board
4201 Wilson Blvd.
Arlington, VA 22230

Dear Director Córdova and Chairman Arvizu:

A whistleblower has provided information to us regarding a draft audit performed by the Defense Contract Audit Agency (DCAA), where it was discovered that the National Science Foundation (NSF) provides federal grant money in the form of a “management fee” to the National Ecological Observatory Network (NEON) each year. NEON appears to use this fee to pay for what would otherwise be unallowable costs. These are expenditures for which non-profit organizations may not ask for government reimbursement pursuant to OMB Circular A-122. 1

DCAA data shows that, from FY 2009 to FY 2013, NEON has received $888,028 in government funds, granted through the NSF, for these so-called “management fees.” 2

On December 8, 2008, NEON wrote to NSF requesting this “management fee” to cover otherwise unallowable expenses. 3 NEON requested $190,000 in taxpayer dollars and told NSF that the request would cover a variety of expenses, including $14,000 for meals and meetings which “are unallowable due to the lack of correlation to documented objectives,” and $50,000 for a lease cancellation expense that NEON was not required to pay. 4

This 2008 letter to NSF seems to have started the practice at NEON of using a taxpayer-funded “management fee” to cover costs for which federal grant money should not be otherwise awarded pursuant to OMB A-122. NEON’s cost accounting policies from 2013 appear to indicate that this practice has continued unchanged from 2008. The policy regarding management fees reads: “These management fees are used only for...costs that are not chargeable to federal agencies.” 5

In FY 2013, NEON used these fees to fund a $25,000 office Christmas party, $11,000 for premium coffee services for NEON employees, $3,000 for Board of Directors dinners that included alcohol, and $3,000 for t-shirts and other apparel for NEON employees. 6 As you are

2 NEON, “Management Fee Summary — FY 2009-FY 2013.”
3 NEON, “Management Fee Request for NEON Award DBI0752017,” (Dec. 8, 2008).
4 Id.
5 Id.
6 NEON, “C-10b Management Fee Expenditure Detail for FY 2013.”
aware, spending taxpayer dollars on alcoholic beverages, meals, entertainment, and travel that is not part of official business and is paid from or attributable to a federal grant, is prohibited by governmental regulation.\(^7\)

DCAA’s draft audit further found that NSF was granting federal funds to NEON to support lobbying activities. As early as 2008, NEON requested fees for “Government Outreach Events” from NSF.\(^8\) In its 2011 990, NEON openly admitted to engaging in lobbying and reported expenditures of $86,000.\(^7\) In FY 2013, NEON’s own budget reported that it spent $122,000 for explicitly labeled “lobbying contract[s].”\(^10\) According to Open Secrets, NEON has spent $340,000 on registered lobbyists over the past four years.\(^11\) These expenditures seem to be in contravention of the Byrd Anti-Lobbying Amendment, which states:

\[
None \text{ of the funds appropriated by any Act may be expended by the recipient of a federal [...] cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress [...]}.\]

Moreover, because NEON’s otherwise unallowable expenditures exceed NEON’s revenue from non-public contributions, it seems that NEON’s lobbying is funded by grant money that is funneled through the NSF.\(^13\)

NEON is clearly spending its “management fee” on otherwise unallowable costs. Its own Cost Policy Statement recognizes that certain costs are “unallowable under any circumstances,” including alcoholic beverages and lobbying, but then states that line item 990-9 in its budget can be used to itemize these costs in the “Management Fee Pool (unallowable activities).”\(^14\) Additionally, NEON’s policy manual acknowledges in multiple places that certain expenses are unallowable and cannot be billed to the project,\(^15\) but then states that “[such] transaction ... is unallowable and will not be reimbursed, or it will need to be charged against NEON’s management fees. (Emphasis added)”\(^16\) A form is even provided so that employees can bill

\(^{7}\) 2 C.F.R. Part 230, supra.
\(^{8}\) “Management Fee Request for NEON Award DBIO752017,” supra.
\(^{9}\) Form 990, supra at pp. 3, 10.
\(^{10}\) NEON, “C-105 Management Fee Expenditure Detail for FY 2013,”
\(^{13}\) For example, in 2011, only $57,500 of revenue did not come from contributions, while lobbying expenditures alone totaled $86,000. NEON Inc., Form 990, OMB No 1545-0047, Form 990 (2011) Propublica, “National Ecological Exploratory Network, Inc., Form 990 Returns, by Year,” http://projects.propublica.org/nonprofits/organizations\2045510571.
\(^{14}\) NEON, “NEON Cost Policy Statement – FY13.”
\(^{16}\) Id. at 209.
otherwise unallowable costs as management fees.\textsuperscript{17} Notably, this form has an option for employees to select that they are billing the project for “Lobbying.”\textsuperscript{17} A copy of this form is attached.

The concern over reimbursement of unallowable costs at NEON raised by DCAA’s draft audit is amplified by the possibility that this “management fee” practice is widespread throughout the NSF.\textsuperscript{18}

According to a publicly available September 2012 Alert Memorandum from the NSF Office of Inspector General (NSF OIG) to NSF’s Office of Budget, Finance, and Award Management (BFA) Head and Chief Financial Officer, “…NSF cannot affirm that government funds are being properly accounted for in accordance with federal standards, which increases the risk for unallowable costs.”\textsuperscript{18} This Alert cited a DCAA audit for the BFA head, which questioned NSF’s award of “approximately $305 million (almost 28 percent of the proposals’ funding): in unallowable or unsupported costs.”\textsuperscript{20} Thus, as early as 2012, NSF was aware that it was granting federal money to pay for projects’ expenditures on unallowable costs.

In light of these concerns, please provide the information requested and answer the following questions:

1. Please provide all correspondence with NEON related to “management fees” and unallowable costs from its inception to the present.

2. Please provide a detailed accounting of all unallowable costs incurred by NEON from its inception to the present.

3. Was NSF aware that NEON was funding otherwise unallowable costs with the management fee?
   a. If so, what legal justification permitted this grant authorization in spite of OMB Circular A-122?
   b. If so, what legal justification permitted the funding of lobbying in spite of the Byrd Anti-Lobbying Amendment?

4. What portion(s) of NEON’s Policies and Procedures manual was derived from language suggested by the National Science Foundation, or copied from other NSF policy guidebooks? Please provide specific page references, particularly with regards to references of “unallowable costs” or “management fees.”

\textsuperscript{17} Id. at 232, 464 (“12.14 Appendix N – Pre-Approval of Unallowable Expenditures Form”).


\textsuperscript{20} Id. (Emphasis added).
5. In the past five years, have other NSF grantees received compensation in the form of “management fees”? If so, please list for each grantee:

   a. The amount of “management fees” granted for each year they were awarded,
   b. The alleged purpose(s) of the monies,
   c. What portion of the management fee covered unallowable costs, and
   d. The justification for granting awards for any unallowable costs that were covered.

Thank you for your cooperation and attention in this matter. We would appreciate a response by October 1, 2014. If you have any questions, please do not hesitate to contact Chris Lucas for Ranking Member Grassley at (202) 224-5225.

Sincerely,

Chuck Grassley
Charles E. Grassley, Ranking Member
U.S. Senate Committee on the Judiciary

Rand Paul
Rand Paul
United States Senator
12.14 Appendix N – Pre-Approval of Unallowable Expenditures Form

PRE-APPROVAL OF UNALLOWABLE EXPENDITURES AND USE OF NEON PRIVATE FUNDS

Amount of Expenditure

☐ Losses ☐ Alcohol: ☐ on premises ☐ off premises
☐ Fundraising ☐ Lobbying
☐ Contributions and Donations ☐ Entertainment
☐ Marketing Materials ☐ Other:

Justification

Approvals

Requestor: ____________________________ Date: ______________

CEO: ____________________________ Date: ______________

COO: ____________________________ Date: ______________

CFO: ____________________________ Date: ______________
5 September 2014: DoDIG finally gets back together with me to discuss the CSM disclosures. Following a telecon on the matter with Mr. Aloush and Mr. Dixon, I document the conversation in an email to both gentlemen:

Thank you for calling to discuss the subject issue. You and Mr. Dixon mentioned several times during our conversation that the DoDIG had it is possession an "MRD" from DCAA Headquarters justifying the decision to overrule the audit dated 30 May 2014. We were able to locate the memo you referenced, which is not an MRD "Memorandum for Regional Directors" but a "Memorandum for Deputy Regional Director", which is what confused me.

I have attached a copy of that memo hereto; please verify that we are talking about the same document. The memo was issued at 4:25 PM Mountain Time (see email "FW: Policy Response on the Colorado School of Mines") attached) on 30 May. The memo was not a decision. Rather, it provided some additional information and advised us to perform additional audit work to determine if our audit findings were still valid in light of GASB No. 27.

We had already begun revising the SOCAR in response to the telecon (which the memo merely repeats), and issued a revised SOCAR at 5:05 PM on 30 May (again, see email "Colorado School of Mines Latest Revision of Pensions SOCAR").

I have attached the last draft Statement of Conditions and Recommendations prepared prior to the 30 May memo ("C EVALUATION OF NONCOMPLIANCE"). I have also attached an email containing the SOCAR I prepared on 29 May immediately after the Headquarters telecon of the same date and BEFORE we received the memo on 30 May (see "Revised CSM SOCAR"). You will note extensive revisions between the pre-telecon/memo drafts and the revised draft in response to the comments provided by Headquarters in the 29 May telecon and 30 May memo.

The actual DECISION is an email (see "FW 2013 Colorado School of Mines Pension Costs") from Ms. McKune via Mr. McAfee and is the only written communication I received from Central Region instructing me to issue a clean report. That decision merely approves Headquarters "Guidance" without addressing ANY of the EXTENSIVE revisions made in the last revised SOCAR which directly addressed Headquarters" original concerns. Also, the Headquarters "Guidance" is simply assertion with no support, and makes no attempt to engage any of our revisions or counter-arguments. Therefore, it is unquestionable that there is a lack of adequate documentation for Ms. McKune's decision in violation of GAGAS.

(emphasis added)

It is worthy of note that the kind of lack of documentation I was pointing to on the CSM (and NEON, prior to the NER decision) engagements is exactly the same as the DoDIG findings in the peer review.

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Given the seriousness of the lack of documentation on NEON along and the implications vis-à-vis the Code and GAGAS, I must question whether DoDIG’s “pass with deficiencies” opinion was correct, or if the impact of a ‘fail’ opinion so influenced it that it improperly passed DCAA despite having significant evidence that DCAA was fundamentally noncompliant with GAGAS and the Code. Indeed, DoDIG makes no mention of the Code at all in its report – even though compliance with the Code is required by GAGAS through the SSAEs.

11 September 2014: I learn from Mr. Jones that both Mr. McAfee and Ms. McKune have been transferred to more desirable positions within DCAA and that DCAA Deputy Director Anita Bales had been named the new DCAA Director, despite my allegations against her discussed above. I summarize the transfers for the Congress as follows:

On 1 October 2014 Denver Field Audit Office Manager Allen Jones (my second level supervisor) will be stripped of his "mobile" auditors including myself and the team that worked on the NEON and Colorado School of Mines' engagements. Those personnel (including me) will be transferred to the Rocky Mountain Field Office effective that date. This transfer is being justified by the smaller size of the Rocky Mountain Field Audit Office compared to the Denver FAO. At the same time, Supervisory Auditor Michael Quant (my immediate superior) is rotating to the Lockheed Martin Sub-Office. This is a routine rotational transfer. **However, the bottom-line effect is to separate the leadership team (Allen as FAO Manager, Mike as Supervisory Auditor and myself as lead auditor) that performed the NEON and CSM audits and produced results that were later overruled by DCAA Headquarters.** While in a vacuum these transfers may be justified, the fact that they were initiated by Deputy Regional Director Martha McKune, the primary antagonist in the NEON and CSM engagements, before she transferred to the Northeastern Region are very concerning, and I bring your attention to them.

On that same note, Ms. McKune's transfer is in itself concerning. You will recall that the Northeastern Region performed the allegedly "independent" review of the NEON audit before the Northeastern Region Deputy Regional Director affirmed Ms. McKune's initial order to remove the vast majority of the audit findings (including ALL of the findings related to management fees). Almost immediately afterwards Ms. McKune is transferred to the Northeastern Region as their new Deputy Regional Director (replacing the one that made the decision) and is widely considered the de-facto heir to the regional directorship in that region. **This could easily be seen as a reward for Ms. McKune's reprehensible actions on the NEON and CSM audits, and coming so closely on the heels of the Northeastern Region decision to whitewash the NEON audit calls into question the alleged independence of the Northeastern Region review even further** (recall that I have already raised other issues about the review). The appointment of Anita Bales (who you will recall threatened me for going to Congress with the NEON matter via telephone) as the new Director of DCAA is even more concerning. Again, I draw your attention to these concerning developments.

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Again, the timing of these transfers so quickly on the heels of the NEON and CSM disclosures, combined with the other information above and below, appears to show a retaliatory motive towards the local NEON/CSM attestation team, and a motive to reward the bad behavior of Ms. Bales, Ms. McKune and Mr. McAfee. To point out the utter absurdity of DCAA’s actions, one need look no further than the fact that Mr. McAfee’s transfer was to become the new Division Chief of Quality Assurance. Given the allegations against Mr. McAfee related to the NEON and CSM audits, his appointment as the head of the audit quality division appears to be the auditing equivalent of naming Reinhard Heydrich as president of the Anti-Defamation League.

15 September 2014: A senior Congressional staffer states in an email that the GAO “confirmed that the practice of using management fees to pay for unallowable costs was widespread among nonprofits”. This suggests that the issue may be far larger than just the NSF. Again, given the fact that the DoD is the largest payer of management fees to nonprofits, as discussed above, this also gives the DoD (and, thus DCAA as a dependent agency of DoD) very strong motivation to make the NEON audit findings (and their implications upon DoD’s own conduct) go away.


Two senators are investigating whether the National Science Foundation and Defense Department auditors skirted federal laws by signing off on a nonprofit organization’s use of taxpayer money for “unallowable expenses,” including alcohol, lobbying and extravagant parties.

…

From 2009 to 2013, NEON classified all the expenses that Grassley and Paul are questioning as a “management fee.” Internal documents show that the NSF was told by NEON that it was having a difficult time covering the costs because it had little in the way of private funds.

The auditor concluded that the practice was a “mechanism by which NEON evaded the prohibition against the payment of unallowable costs,” documents show.

But top management within the Defense Contract Audit Agency — which employs the auditor — said in interviews and a prepared statement that it plans to override his findings and approve the costs. The NSF hired the audit agency to conduct the audit because of its expertise with large construction contracts, the foundation said. The final audit has not yet been released.

“Government regulations put no restrictions on the company’s use of this fee,” the auditing agency said in a prepared statement. “Because Government regulations put
no restrictions on management fee expenditures, it is inappropriate for DCAA to disallow those costs.”

A fee is supposed to cover the costs of managing a contract or a cooperative agreement with a government agency, and typically is less than 1 percent of an organization's budget, records show.

Grassley said in a statement that the approach is a “back-door” attempt to find a way to have taxpayers pay for the expenses that otherwise would be disallowed. The senators are now asking NEON and the foundation for correspondence between them related to the reimbursed expenditures, the justification for using taxpayer funds for the expenses and details about the nonprofit group's lobbying efforts.

According to Grassley’s staff, the auditor said two levels of supervisors signed off on his work. However, he told the senator's staff that he said he believes the audit had stalled because DCAA management was concerned about spark a controversy for the high-profile program, the foundation, and the defense department.

Grassley’s staff said the auditor came forward because he believed the audit was going to be “whitewashed.”

In the unlikely event that anyone in DCAA management was not aware that I had blown the whistle, they certainly were at this point.

18 September 2014: Mr. Jones summoned me to his office and expressed concern that I was the source of the information cited in the Washington Post. I stated that I would the source for Congress, but that I had not provided any information directly to the media, or the general public. Mr. Jones gave me a direct order, (according to him at the instruction of senior DCAA management) not to discuss any aspect of the NEON engagement with the NEON or the public.

I summarized the conversation immediately afterwards in an email to Mr. Jones:

To briefly recap our conversation of 18 September, I have not discussed and do not intend to discuss the confidential details of the NEON audit with any member of the media (or the general public for that matter) as that would arguably constitute both a violation of DCAA policy, and an improper disclosure of contractor information under 18 U.S.C. § 1905 since most such details came to me during the course of my official employment and are arguably nonpublic in nature. As my identity is apparently well known to the media (despite the moniker "the whistleblower" in the Washington Post article that came out today about NEON) through Congressional release of details of my protected whistleblower disclosures to the Congress, I am aware that members of the media may contact me for comment. Should that occur I will have no comment on the matter and will refer them to DCAA Headquarters and the Congress as required by rule, law and DCAA policy.

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It is highly questionable under the Whistleblower Protection Act whether this order is lawful, at least as to material not prohibited from disclosure by law (e.g. 18 U.S.C. § 1905).

The Supreme Court of the United States (“SCOTUS”) held in Dept. of Homeland Security v. MacLean 574 U.S. ___ (2015) that agencies could only ban public disclosures in such a disclosure violated a law. The Court held that the term “law” meant a statute, not a regulation or agency rule. Therefore, DCAA’s order not to disclose any information related to the NEON engagement publically would appear to facially violate the Act as interpreted in MacLean.

19 September 2014: The House Committee on Science, Space, and Technology officially requests a briefing regarding NEON and the NSF:

21 September 2014: an entry is made on the Wikipedia “List of Whistleblowers’ page naming me as the source of the Washington Post article (via Senators Grassley and Paul) and elaborating upon some of the
information contained in the article. Specifically, the post names Ms. Bales, Mr. Fitzgerald, Ms. McKune and Mr. McAfee as officials I had accused of misconduct related to the NEON engagement.

22 September 2014: I write to Regional Director Graff, copied to Ms. Bales, Ms. McKune and Mr. McAfee (my chain of command since Ms. McKune and Mr. McAfee’s transfers do not begin until 1 October) and state:

I have been directed by the Honorable Lamar Smith (Chairman) to brief the House Committee on Science, Space and Technology tomorrow in regards to the NEON audit and will be acting in my official capacity (albeit as a whistleblower) when doing so at the written request of the Committee chair (which my FAO Manager Allen Jones already sent up the chain upon receipt). The Committee is investigating the allegations surrounding NEON's use of management fees as put forward in the draft NEON audit that was later overruled, as well as the various fraud referrals I issued related to that engagement. I have regretfully been unable to comply with DCAA 5030.16 "Supporting Congressional Requests for Information" because substantial portions of that policy violate 5 U.S.C. § 7211 and the Whistleblower Protection Enhancement Act of 2012, as well as other rule and law, and the Congress has directed me to disregard it as a result (I have brought the issues related to that policy to the attention of DoDIG and DCAA's IRD, but have received no response from either).

As such, I have no lawful guidance on how to proceed in the matter.

Therefore, if Region or Headquarters has any instructions for me in this matter, now would be the time to communicate those to me.

Subsequent to my issuing this email to senior DCAA Management, I attempted to access my copy of the NEON working paper package stored on the DCAA network. I found that all of my NEON files had been deleted.

I immediately requested a copy of the files from Mr. Quant, who had access to the “official” backup. Mr. Quant flat-out refused to provide me with access to the backup, even after I showed him the latter from Chairman Smith (upon which he had been copied). Mr. Quant stated that my lack of access to the documents neccessary for me to complete the briefing requested by Mr. Smith was “your problem”.

I immediate informed the Congress in an email:

Tomorrow at 2:00 PM Mountain Time I am scheduled to brief the staff of the House Science, Space and Technology Committee. Per DCAA policy, this morning I informed the Director DCAA, Regional Director (Central Region), Deputy Regional Director (Central Region) and Regional Audit Manager (Central Region/Denver) of the request and my intention to provide the briefing. The Chair of the Committee (Rep. Lamar Smith) already sent Headquarters, via my FAO Manager, a formal written request for me to be furnished.
As part of my preparation for the briefing, a few minutes ago I attempted to access my files stored on DCAA's network, which include complete copies of every audit upon which I have worked including NEON. I was shocked to discover that my entire folder (but not the folders of everyone else at my office) has disappeared. This means that I do not have access to the documentation supporting the NEON audit. This folder was in place on Friday afternoon as I performed my weekend backups at that time. Attempts by local IT support to locate the file has proven unsuccessful (meaning that it had not merely been misplaced). It is possible that the folder disappeared due to error, but given the alternative possibility (that it was removed deliberately to deny me access to the information I have been providing to the Congress) I thought it important to alert you all right away. I have requested that regional IT restore my files from an offsite backup, and have also requested an investigation into what happened to the original files (we have tracing in place that can determine exactly whom moved/deleted the folder and when they did so). I will inform you as soon as there is movement on either of those issues. Obviously if the files were deliberately deleted to prevent me from accessing them to brief the Congress, that would be a most serious violation of the law by DCAA.

Fortunately I have most of the information in offline backups (an uncommon practice, but one I am glad that I undertook), and I do not expect the disappearance to greatly affect my ability to perform the briefing or provide information to the Congress going forward.

The files were ultimately restored from network backups. However, no explanation was ever provided by DCAA management for the deletion of the files, nor was any investigation conducted into why the files were deleted. Considering the context, and the actions taken later (and discussed below) related to my access to the NEON working papers, I must conclude that DCAA management deliberately deleted my NEON documents in an attempt to interfere with the science committee’s investigation. This is also supported by the fact that a network backup of the files was only located by Agency IT after I revealed that I had a backup of all of the documents on a CD-ROM – a very uncommon practice for an individual auditor due to the security risk of having documentation on a physical and unsecured medium.

Perhaps in response to being caught pretty much red-handed interfering with a Congressional investigation (which is of course a criminal offense under 18 U.S.C. § 1505) and destroying Federal records (also a criminal offense – 18 U.S.C. § 1519) Ms. Graff stated in an email to me (copied to Ms. Bales, Ms. McKune and Mr. McAfee):

The Agency has no issue with you providing a briefing to the House Committee on Science, Space and Technology or you doing so during official time.

Further, we do not believe that the DCAAAR 5030.16 applies to your situation. This regulation, which discusses Agency support of Congressional requests for information, is intended to establish procedures and responsibilities for providing official DCAA responses to request for information and visits initiated by Congressional members. If the Committee wants to make an official request please have them contact Joe Garcia, DCAA Executive Officer at (703) 767-3265 or joe.garcia@dcaa.mil.

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Again, the Agency’s response appears to be based upon it getting caught red-handed with an illegal gag-order in violation of the Whistleblower Protection Enhancement Act of 2012. Rather than remove the offending policy as required by the Act (and, thereby, eliminating any chilling effect that its mere existence likely has upon DCAA employees), DCAA management simply arbitrarily exempted me, and me alone, from the policy. This transparent attempt to avoid a legitimate complaint by me that the Agency had violated the Act whilst simultaneously keeping the gag order in place for all other DCAA employees (Note: the policy is still in place to the best of my knowledge as of the date of this disclosure) is worthy of further investigation.

23 September 2014: After my NEON files were miraculously recovered from a network backup, I stated to the Congress:

I was able to restore the missing files from an archival backup kept offsite by IT on a different server, but no explanation has been provided regarding the fate of the original files. As I noted yesterday, it could just be some sort of strange IT error. However, to a less generous mind would note the fact that my files and only my files disappeared (all the remaining auditors in my Branch were unaffected despite having their files on the same server and, indeed, in the same folder), that I have never had an issue like this before in over two and a half years at this post, and that it occurred AFTER I notified Headquarters of the briefing for the House Science, Space, and Technology Committee today but BEFORE the briefing occurred; and conclude that the circumstances are at least suspicious. Couple that with the refusal of my supervisor to provide me with one of the general backup files for NEON that he is responsible for keeping (and that is substantively identical to my own files) to use during the briefing, and one can start to see parallels with the Lois Lerner lost emails fiasco.

Therefore, I suggest that an investigation be conducted into the server logs from DCAA to see what transpired. The logs will show what actions (move, delete, etc.) resulted in the files disappearing, and will also show whether the actions was made by a person, or by the system automatically. If made by a person, the logs will identify who that person was, and when they took the action(s). If that person is from Region or Headquarters (who have no business in the local FAO's files), that will be damning vis-à-vis the allegations above. If, other the other hand, that person is a colleague from the local office with files in the same folder, it could very well be an accident.

Therefore, the logs should beyond any reasonable doubt whether the files were lost due to a server malfunction, accidentally deleted by a colleague, or deliberately removed by someone at Central Region or DCAA Headquarters. I think it prudent to determine whether this was an error (albeit a highly coincidental one), or something more nefarious in line with my other allegations herein.

23 September 2014: In a separate email from that above, I state to the Congress:

You may recall that a couple of months ago I indicated to you that Mr. McAfee the Regional Audit Manager ordered me verbally via my supervisor to have no contact with the NSF-OIG
(specifically including any contact related to NEON) as part of my official duties following the implosion of the CSM audits. I believe I noted at the time that such a gag order violated rule and law including the Inspector General Act of 1978 and the Whistleblower Protection Enhancement Act of 2012. However, because I had at that time provided everything I had to the NSF-OIG, there was no need to fight the order. However, subsequent to that date additional developments have occurred, which I have duly provided to all of you. The House Science, Space, and Technology Committee spoke to the NSF-OIG, which indicated that some of the information now released publically about NEON has not been previously communicated to them by DCAA. It is entirely possible they are correct. Obviously the Congress could just provide the information they need (which appears to be HSST’s plan), but that still leaves unaddressed the order not to communicate with the IG during official time and/or in my official capacity. It may be worthwhile to challenge that order by requesting it in writing and, if so provided, by challenging it as unlawful. On the other hand, it may be a better idea to let that sleeping dog lie, at least for now. I would welcome your thoughts and advice on the subject before I make a decision on how to proceed in the matter.

After consultation with staff for several committees of the House and Senate, it was determined to note the issue as a violation of law (e.g. interference with an inspector general) for follow-up later (Note: which is one of the purposes of this disclosure), but not to fight the issue head on at the time because I was already ignoring the order as to the Congress and could comply with it as to the NSF-IG, at least for the moment, without compromising my duty to report fraud, waste and abuse to the appropriate authority (5 CFR § 2635.101(b)(11)).

23 September 2014: It came to my attention that a person using a DCAA Internet Protocol (“IP”) address vandalized the Wikipedia page discussed above and attached me personally. I notified the Congress:

On Monday 22 September, someone vandalized the article to make me out to be a lunatic. Wikipedia’s IP Tracing shows that the person who made the modifications to the article did so from an official Department of Defense IP Address. Evidence supporting these allegations is attached hereto. I don’t particularly care what someone writes on Wikipedia one way or another … but the fact that a Government employee on an official Government computer would attack me in such a public and vulgar fashion is, I think, worthy of attention…

I informed Mr. Jones of this issue via email, and Ms. Janysek via phone. I summarized the conversation with Ms. Janysek immediately afterwards in an email to her:

Per our conversation of 23 September, I have communicated to you my concerns regarding vulgar modifications to a Wikipedia entry about whistleblowers (recently including myself) made by a person with a DoD IP address. Due to the public nature of Wikipedia, the sensitivity of the issue, and the fact that anyone can see the insulting changes were made by someone within DoD -- I brought the issue to your attention, and you indicated you would delve into the matter further.

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Mr. Jones responded:

I wish I could explain this, but it is, as you say, weird. **I've spent a lot of years with this Agency and this is a new one for sure.** I'm debating whether to say something to the staff, i.e. whether to draw any more attention to it. We can discuss when I return next week. (emphasis added)

I responded:

Agreed. Whomever it was tried to mask their IP address and went in and deleted the entire page after the vandalism was caught and reversed. Of course, the 11 year olds at Wikipedia spotted it and are hunting down the IP address. If it's a DCAA address again, social media is going to be screaming government cover up (some already are). I let IRD know so HQ would not be blindsided if the media comes calling.

23 September 2014: After further investigation (on my own time) I called Ms. Janysek to discuss the matter. Again, I followed up immediately with an email:

Per our telephone conversation of 24 September, I have communicated to you my concerns regarding the modifications to Wikipedia made on 22 September from IP Address 214.25.29.6 which is host gateway6.dcaaa.mil via the United States Columbus DoD Network Information Center that we originally discussed yesterday 23 September. I have also discussed the fact that someone with username "Angelfart12587" deleted the Wikipedia entry entirely yesterday from a freshly created account, masking their IP from the general public. As IP addresses are still visible to Wikipedia administrators, it is likely that the community will find out the source IP of the deletion. Should that IP also be from a DoD computer, there is likely to be a social media outcry under the assumption that vandalism/deletion represents official Government action.

You noted to me that you were concerned that certain parts of the Wikipedia entry could be viewed as inaccurate -- you specifically noted the transfers/promotions of the individuals named in the original entry. While obviously I have no responsibility for what is written on Wikipedia (free speech being what it is); I indicated to you that I would be happy, in my personal capacity and from a personal computer, to edit the entry to be more fair and balanced -- and I will do so from my phone on my morning break. However, I did note that the Wikipedia community is free to overrule my edits if they so choose -- free speech being what it is.

I later stated:

Someone else got to the Wikipedia page before me and fixed the offending sections -- so your concerns seem to have been resolved.

While I was trying to be extra-cooperative with Ms. Janysek, I will note that her statements to the effect that I should edit the Wikipedia page to remove references to the officials I was accusing in
my disclosures not only holds me responsible for something said on the internet and far outside of my responsibility, but it also directly requesting that I censor free speech. Such a ‘suggestion’ from a very senior official in DCAA is concerning.

25 September 2014: I received an email from Ms. Jenny Lindenbaum, Agency Security Officer for DCAA, asking me to give her a call. I did so. I sent a summary of the conversation in an email to the Congress immediately afterwards:

I am truly lost on this one, so I will just give you the facts.

As I noted earlier, the DCAA Security Officer Jenny Lindenbaum dropped me an email this morning. I called Ms. Lindenbaum this afternoon and she stated to me that multiple anonymous persons had telephone DCAA security and report that 1) I had made threats against the United States Capital and 2) that I was on medication and seeking counseling related to psychological issues.

Obviously, I was stunned by the brazenness of these official accusations against my character -- especially as they are grounds for immediate termination (likely without appeal) from Federal service on security grounds.

It goes without saying that I have never made violent threats against the United States. The only comments I have every made come even close is that I will tend to use rhetorical flourishes in verbal conversation like "the contracting officer is going to explode when she reads this", "let's use our nuclear option" (referring to using a harsher method in an audit or the like) or something similar. I have been making such comments my entire life, including the last 2.5 years at DCAA, without so much as a murmur. Now, within a week of the Washington Post article (which, as I have said before, everyone knows I was the source - via Congress - as I've never tried to hide on this issue) I've been hacked on social media and accused of being a lunatic, and now someone is (or some people are) reporting me to security for making terroristic threats and being a medicated crazy person.

… I certainly have not been seeing a counselor or psychologist, nor discussed such a thing in the office […] publically or privately.

I am beyond incensed at these allegations, and have no idea how I should proceed. DCAA Security has requested that I verify that I have not made any threats and do not have a medical condition that renders me unfit for service, which I will do. But someone needs to be done about this – and clearly DCAA and DoDIG cannot be the ones to do so. Therefore, I request your advice on the matter. What the heck do I do?

During the course of the conversation, I also asked Ms. Lindenbaum directly whether she had discussed me with Mr. Janysek, and whether she was aware that I was a whistleblower. She stated that she had not discussed me with Ms. Janysek and was not aware and did not care that I was a whistleblower. When I pointed out that accusations from ‘anonymous sources’ that I had made terrorist threats was about the most transparent and stupid attempt at whistleblower reprisal imaginable, she stated that my security clearance...
eligibility (and, thus, my employment with DCAA) would be in question if I refused to state in writing that I had made no threats, that I was not on medication, and that I was not seeking psychological treatment.

I stated to Ms. Lindenbaum that I would consult with Ms. Janysek, Congress, and my legal counsel before proceeding.

I immediately hung up and called Ms. Janysek. I asked Ms. Janysek whether she had spoken to Ms. Lindenbaum about me. Ms. Janysek stated that she had just finished discussing me with Ms. Lindenbaum, and had informed Ms. Lindenbaum of my status of a whistleblower. Therefore, Ms. Lindenbaum’s statement that she had not discussed me with Ms. Janysek and was unaware of my whistleblower status was a lie. Therefore, I conclude that is is very likely that Ms. Lindenbaum’s actions were intended as retaliation against me as a whistleblower either in an attempt to intimidate me, or as an actual attempt to create justification to terminating my employment with DCAA. Additionally, Ms. Lindenbaum’s demand that I share private medical information (any medication and any therapy/counseling treatment) was entirely inappropriate and a gross invasion of my privacy.

Finally, given that these accusations took place mere days after the Washington Post broke the story of the alleged misconduct on the NEON audit, based on my whistleblower disclosures to the Congress, a reasonable person would likely conclude that the security investigation was prompted by the publication of the disclosures.

25 September 2014: Ms. Lindenbaum contacted me via email provided her recollection of the conversation:

You indicated that you had no intention of blowing up the Capital and that the comment was taken out of context. You also have no intention of doing any harm to your co-workers. You also advised that you are currently not taking any medication and have no mental illness or other issues that need to be reported to security.

I responded with far more detail than Ms. Lindenbaum provided as to what we discussed:

There are essentially two allegations presented in your email below -- 1) that I have made terroristic threats against the United States Capital and am a danger to those around me; and, 2) that I have been taking medication related to mental illness or illnesses and have been seeking counseling or other treatment for such illness or illnesses. I will respond to these allegations in order.

First, as to allegations that I made a threat against the United States Capital and am a threat to hose around me, I deny making or being such a threat. The allegations consist of two subparts -- a) that I made a threat or threats to blow up the United States Capital and b) that I am a danger to those around me.

a) As I stated to you during our conversation, I do not recall making a comment that, even taken out of context, could be viewed by a reasonable person as a threat against the United States Capital; but if such a comment were to have been made by me, it
was a rhetorical flourish, not a threat of violence of any kind. I have not and do not intend to take any unlawful or violent action against the United States, including both its assets and its employees.

b) As noted above and during our conversation, I have and do not intend to take any unlawful or violent actions against any employees of the United States. To the best of my knowledge, I am not nor ever have been a threat to the physical safety of those around me including both my fellow Federal employees and the general public. I have never been arrested nor charged with any crime of any kind (including moving traffic violations) in my life. I have on two occasions received a parking ticket, both of which I successfully appealed.

Second, as to the allegations that I am mentally and physically unfit for Federal service in a sensitive position, I deny being so unfit. The allegations consist of two subparts -- a) that I take medication that, somehow, renders me unfit for Federal service and b) that I am seeking treatment or counseling for mental illness or illnesses that would render me unfit for Federal service.

a) As to the medication issue: I am presently taking a very low dose (10mg) of Amphetamine Salts (generic for Adderall) as prescribed by my family physician. I am taking this medication in accordance with the FDA approved dosage instructions. To the best of my knowledge, I am not taking this medication related to a diagnosed mental illness. Please note that I notified my Field Audit Office Manager Allen Jones on 21 July 2014 when I began taking the medication, and also asked DCAA Security whether I needed to report that I was taking the medication (see email of 21 July attached hereto). Security [Note: the email from security was actually from Ms. Lindenbaum as I discovered when I went back and reviewed it] indicated that I need not report the medication unless and until it flagged on a drug test. I have mentioned to no other persons with DCAA that I am taking any medication of any kind; nor am I taking any other prescription medication. The only way a person other than FAO Manager Jones and perhaps my supervisor Michael Quant would know I was taking medication, is if they opened my desk cabinet without permission and saw the bottle therein.

b) I do not, to the best of my knowledge, been diagnosed with or indeed have any mental or physical illness that renders me unfit for Federal service -- including specifically any mental illness or illnesses that would render me a security risk or a danger to Government personnel or the public. I have not in the past, am not currently, and do not intend in future to seek any counseling or treatment related to any diagnosed mental illness or illnesses.

I also have several administrative notes.

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First, during our conversation I asked whether you had spoken regarding my status as a whistleblower/Congressional witness with Assistant Director Angela Janysek. You stated you had not. However, during my immediately subsequent conversation with Ms. Janysek, she stated you had spoken with her regarding the matter. Please clarify so that I can have a clear timeline in my notes.

Second, as I noted during our conversation, in the 2.5 years I have been with DCAA, to the best of my knowledge no person has accused me of being physically or mentally unfit for Federal service, nor has anyone reported that I have made terrorist threats. My rhetoric, manner, and personality have not substantively changed during that time period. Therefore, as I stated to you, I find it very unlikely that only now -- coincidentally mere days after my status as a whistleblower was publically revealed -- someone has decided that I am a lunatic, and that I am a danger to others. Rather, I find that these allegations are merely one more in a line of retaliatory conduct by Department of Defense personnel that included, just this week alone, multiple attempts to paint me as mentally unfit and/or delusional on social media; at least one attempt of which originated within DCAA according to the IP address, and as confirmed by Assistant Director Janysek during our phone conversation noted above. Therefore, I requested that DCAA undertake an investigation to determine whether these allegations have been made in bad faith, whether due to a desire to retaliate against the whistleblowing or for another reason, or were made (albeit unreasonably and in error) in good faith. Assistant Director Janysek indicated that she would undertake such an investigation immediately.

Third, you stated during our conversation that you would consider denial of the allegations to be sufficient to close the matter with no stain on my honor, reputation, or fitness for service. As I have so denied the allegations, I presume any investigation or inquiry into my conduct related to these allegations are now closed.

I summarized my conversation with Ms. Janysek in an email to her thereafter:

Per our telephone conversation of 25 September, it is my understanding that DCAA's Internal Review Directorate has opened an investigation into the allegations addressed in the attached email and will attempt to determine whether said allegations were made in good faith (albeit unreasonably and in error) or in bad faith as retaliation for my protected disclosure of the NEON audit to the United States Congress, or any other unlawful reason. I look forward to the results of your investigation.

Also per the same conversation, you stated that you had coordinated with IT to look into the vandalism of the entry regarding my whistleblowing on Wikipedia, and substantiated that the vandalism came from within DCAA by a DCAA employee working on a DCAA computer during working hours. However, due to the large number of DCAA personnel accessing that particular web page (you indicated there were some 2,000 hits from within the Agency on Monday 22 September alone) during the time period in which the vandalism occurred, IRD was unable to determine exactly who made the false and malicious edits. As we discussed, it is my hope that DCAA Headquarters will make clear to all employees through
an Agency-wide directive or other form of communication that undertaking such petty, discreditable, and retaliatory activity on Government time and from a Government computer (and thereby giving the appearance of sanction by the Government for the activity) will not be tolerated going forward.

Note: I have never received a report or any other indication that IRD or its sucessfor DCAA-IG ever conducted an investigation into the accusations made to DCAA Security by ‘multiple sources’ (as related by Ms. Lindebaum). Therefore, I conclude that there is substantial evidence to support that the actions by DCAA Security were arbitrary, capricious, and intended solely as retaliation for my protected whistleblower disclosures.

26 September 2014: Following a second conversation with Ms. Janysek on 25 September, I provided the following summary to Ms. Janysek via email the next day:

I wanted to follow up on our conversation yesterday 25 September 2014 regarding the DCAA Internal Review Directorate ("IRD") investigation into whom in DCAA vandalized an entry about the NEON audit and my protected whistleblower disclosure on Wikipedia's "List of Whistleblowers" page during working hours using their DCAA-issued laptop.

As we discussed previously on 24 September, using a Government computer during working hours to post insulting messages about the protected whistleblower disclosures of a fellow Federal employee is a serious issue (and an unlawful act if part of retaliation for such a protected disclosure), and you pledged a full investigation of the matter.

You stated during our conversation of 25 September that you had collaborated with 'IT' to investigate the source of the vandalism, but were unable to trace the actions back to a single individual. Thus, you stated the investigation was now closed -- less than 24 hours after it began. You stated that you wanted to know who had committed the vandalism, but were unable to do so. You gave two separate reasons for your inability to link the vandalism to a single individual.

First, you stated that the IP address used was am external group IP for DCAA. Thus, you were unable to trace the actions back to a specific internal IP address.

Second, you stated that during the hours before and after the posting over 2,000 "hits" to that Wikipedia page came from DCAA. Assuming one hit per person, that means that approximately 2/5 of the entire Agency was on Wikipedia during the period in question.

It is this latter issue I wanted to discuss this morning. As you may know, I am a Certified Information Systems Auditor ("CISA"). CISAs are certified experts in auditing and forensic investigations of information technology systems; the certification is considered the 'gold standard' in those fields. Therefore, as an expert in the field of forensic computer investigations, I had some questions and concerns related to your statements during our telephone conversation yesterday.
1) You stated explicitly that the hits came during a multi-hour period. That indicates that you were able to determine the exact time that each DCAA user 'hit' the Wikipedia page in question. The vandalism in question took place at 2208 hours UTC (6:08 PM Eastern Time/4:08 PM Mountain Time) on 22 September 2014. Therefore, there is no reason you cannot narrow the list of DCAA personnel down based on who was on Wikipedia at that exact minute. Furthermore, if you go to "visone.info/wiki/index.php/Wikipedia_edit_networks_(tutorial)" you will find instructions on how to dump Wikipedia's edit logs with timestamps down to the millisecond. The chances of more than a handful of DCAA employees being on Wikipedia at that exact millisecond are unlikely at best.

2) You also stated explicitly that the hits were to the "List of Whistleblowers" page, not Wikipedia in general. This indicates that you were able to determine the exact page that each DCAA user accessed on Wikipedia. The URL for the article is "en.wikipedia.org/wiki/List_of_whistleblowers". However, the URL to actually EDIT the article is "en.wikipedia.org/w/index.php?title=List_of_whistleblowers&action=edit". Given that there was only one edit on 22 September from a DCAA IP address, it is highly likely that only one person from DCAA accessed the Edit page for the "List of Whistleblowers" posting on that date.

It is of course possible, if extremely unlikely, that more than one person will fit the criteria in No. 1 or No. 2 above independently. However, when you combine the two criteria -- the ability to determine the edit time to the minute (or the millisecond with a little more effort) with the ability to determine who accessed the edit page -- it is virtually guaranteed that only one person will match both criteria. That would be incontrovertible evidence that individual was responsible for the vandalism.

It is also worthy of note, that if the United States Department of Defense cannot trace postings on Wikipedia back to a specific employee, that would be a PHENOMENAL breach in security. It would mean that all Edward Snowden had to do was post his stolen classified information to Wikipedia from a DoD connected computer to avoid detection -- making his flight to Russia look rather foolish in hindsight. If indeed DoD is incapable of determining what its employees are posting online from their Government computers, that should be immediately reported to the Congress and the President as a grave threat to national security.

Given these facts, I request that you reopen your investigation into this matter and determine who was responsible for the vandalism. If that person was person in authority (e.g. supervisor, manager, Region staff, Headquarters staff) or any evidence exists that the person responsible was acting on behalf of any of those individuals -- that is a de facto case of retaliation that requires reporting to the DoDIG, the Office of the Special Counsel, and the Congress. I am requesting this investigation under the anti-retaliation provisions of the Whistleblower Protection

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Act (as amended by the Whistleblower Protection Enhancement Act of 2012) and any other applicable rule, law, policy, or general practice.

Please confirm that you will reopen the investigation based on the facts above, and keep me apprised of your progress on the matter. Given that it took less than 24 hours to complete your first investigation, I do not expect this follow-up investigation to take more than a day or two to complete.

After I pointed out the absolute absurdity of Ms. Janysek’s statement that DCAA was unable to determine which DCAA employee used their DCAA computer to post the insulting messages on Wikipedia regarding my whistleblowing, Ms. Janysek quickly reversed course in an email:

During our conversation yesterday, I never stated that the investigation was closed. IRD with the assistance of DCAA IA are still investigating this matter.

Although Ms. Janysek was not telling the truth about our conversation, I was willing to take the commitment to an investigation as a ‘win’ and move on (for the moment). I stated in an email response:

It was my understanding from our conversation of 25 September that the reports to security were under investigation, but the Wikipedia vandalism was closed due to a lack of technical ability to identify the person responsible. Thank you for the swift clarification that the investigation into the Wikipedia vandalism was not closed; that certainly makes a great deal of sense in light of the information I provided in my previous email. I apologize for my confusion on the matter, and again I appreciate your swift clarification.

26 September 2014: DoDIG finally gets back to me on the CSM engagements, and states in an email:

I apologize for not responding to your earlier. Yes, we have received your e-mail dated September 5th which included 7 attachments. If we have any question about the information you provided, we will contact you. As I indicated to you during our teleconference on September 5th, please contact the DoD Hotline regarding the status of your complaint.

Note: following this exchange of information, I never hear from Mr. Alous or Mr. Dixon again on this subject, despite repeated attempts to contact them via telephone and email. The DoDIG Hotline refused to provide any detailed or useful information on the matter.

29 September 2014: In response to Congressional outrage regarding the Wikipedia vandalism (and the irrefutable proof that the vandalism was committed by a DCAA employee) newly minted DCAA Director Bales issued a statement via email to all DCAA staff stating:

I'm sending this email to lay out my expectation that our communications to and about each other will be professional and respectful. One of the things I appreciate about the DCAA workforce is the passion with which you do your work and the strong belief you have in
what you're doing. With that level of commitment, we are bound to disagree with each other now and then, and there is nothing wrong with that. However, those disagreements must be resolved without resorting to thinking the worst of each other, name calling, or other disrespectful behavior. This respect needs to be demonstrated in all our DCAA communication, including in-person interactions, emails, and postings to social media. When we are representing DCAA, we must always maintain the highest level of professionalism in our work, actions, and words.

Effective team work is central to conducting our important mission. Disrespectful behavior damages our ability to serve each other and our stakeholders, and it is unacceptable. Thank you for doing your part to ensure that disagreements are handled effectively.

Ms. Bales therefore effectively acknowledged the inappropriateness of the statements on Wikipedia.

29 September 2014: I submit the issue as a reprisal complaint to the DoDIG Hotline (No. 2014092910437986) and outlined all of the information above. I never received any response from DoDIG, and to the best of my knowledge DoDIG has taken no action on the matter whatsoever.

30 September 2014: Mr. Quant demands that I provide him with the name and telephone number of each person with the Congress to whom I speak. I immediately inform the Congress that Mr. Quant appears to be attempting to interfere in my protected disclosures to the Congress, and my cooperating with active Congressional investigations (e.g. the House science committee investigation support requested by Chairman Smith). I informed Mr. Quant that I would not provide the request information because he had no legal right to that information.

2 October 2014: I contact Ms. Janysek and state in an email:

I expect to continue to be in correspondence with the nine Congressional committees and subcommittees now investigating the NEON audit and related issues. I have been repeatedly asked what steps DCAA has taken to address the alleged retaliation related to my protected whistleblower disclosures. As your investigation into the security and Wikipedia events are at the center of that question, please provide the status of your efforts on those matters at your first opportunity.

Ms. Janysek responded:

The status of the inquiry into the Wikipedia event is open and the inquiry into the security related events is being handled by management.

Ms. Janysek’s statement is very concerning. As noted repeatedly above, I have accused pretty much all of DCAA management up to and including the Director of misconduct related to NEON, CSM and other other issues discussed above. Therefore, to place DCAA management in charge of investigating the alleged retaliation against me vis-à-vis the Wikipedia vandalism is truly putting the inmates in charge of the asylum.

Given my concerns, I wrote to the Congress and stated:

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DCAA Assistant Director (Internal Review) Angela Janysek stated yesterday (2 October) that the investigation into the false and malicious accusations against me regarding alleged threats to blow up the Capitol, my mental and physical health, and my alleged danger to my colleagues and the public "is being handled by management". That is extremely concerning given that DCAA Management has the most reason to use such outrageous accusations to undermine my credibility. It's putting the wolf in charge of the sheep.

Furthermore, as I noted yesterday, DoDIG closed the 29 September complaint I filed on this issue and the Wikipedia vandalism on or before yesterday (2 October) and without even speaking to me about the matter. I am extremely concerned that neither watchdog has done ANYTHING to protect me from the damage of such allegations. Because such actions are not a 'prohibited personnel practice', the Office of the Special Counsel is useless. That leaves me with no avenue to pursue the issues.

I note from this article: http://www.contractorsperspective.com/postal-service-contracting/u-s-postal-service-plays-the-terrorist-card-against-whistleblower/ this does not appear to be the first time the Government has used this particular tactic …

3 October 2014: I write to the Congress:

As some of you suggested, I contacted the Office of the Special Counsel yesterday and received a call-back from them today. I attempted to explain both the NEON situation (to the Whistleblower Disclosure unit) and the retaliation issue (to the Prohibited Personnel Practices unit). I began with the Whistleblower Disclosure unit. As I began to explain the situation, the call taker cut me off and instructed to file a "Form 12" on the OSC website. Having filed a Form 12 on an unrelated matter several years ago, I know for a fact that OSC takes literally years to get through an online disclosure submission and they almost never get it right (they certainly didn't with my last one). Indeed, last time around it was completely impossible to even get a hold of an actual human being at OSC to discuss the matter. After 18 months of silence, I got a letter telling me that no investigation would be conducted -- all without OSC doing anything that is remotely recognizable as a proper investigation.

Basically, I have found that both DoDIG and the OSC both use online submissions not for the convenience of the submitter, but as a way to not actually have to talk to anyone and do their job. Therefore, I tried to explain to the call taker that I was not prepared to submit a Form 12 into the void and hope that someday OSC would look at it. Instead, I wanted to discuss the matter with someone at OSC with some actual authority before I submitted the form online so that it would get swift attention. Once again, the call taker cut me off, told me to submit the form online, and hung up on me.

As with DoDIG, if this is the sort of professionalism and zeal duty that OSC and DoDIG think is appropriate, then it is no wonder that Government employees think both entities are a joke. A number of my colleagues and superiors told me that attempting to contact
DoDIG and/or [as a whistleblower] was futile, and they have been proven totally correct.

At bottom, I am not inclined to waste my time submitting to OSC a form that will disappear into the ether and never be seen again.

(emphasis added).

3 October 2014: At the request of my new supervisor Mr. Colin Eve and my new FAO Manager (engagement partner) Mr. Brett Rogers (recall my transfer went through on 1 October), I provided the (revised) NEON fraud referral and other documentation related to the issues above to both gentlemen via email.

3 October 2014: The final report was issued without the management fee finding.

Mr. Jones prepared a statement regarding the audit disagreements on behalf of himself, Mr. Quant, Ms. Vaill, and Ms. Blom. He stated:

The draft audit results prepared by the Auditor, Kirk McGill, and reviewed by the Supervisor, Mike Quant, and Branch Manager, Allen Jones, originally contained 8 Statements of Condition and Recommendations (SOCARs). The Regional Audit Manager, Jerry McAfee, disagreed with all 8 SOCARs. The disagreement was elevated to the Deputy Regional Director, Martha McKune. Due to delays in the DRD's decision and to the Auditor's referral of the issues to DCAA HQs/DoD IG, etc…, it was determined that the Northeastern Region Deputy Regional Director, Bill Adie, would be the deciding official on the disagreement. Bill Adie’s final decision was issued on June 26, 2014. Because Kirk McGill had resigned from the audit and because the final decision determined some audit steps needed additional work performed, Kate Blom was assigned as the replacement for Kirk McGill. The additional steps have been performed and final SOCARs prepared based on the final decision. The following represents the documentation of remaining disagreements. The following represents the views of the FAO (Allen Jones, Mike Quant and Kate Blom).

SOCAR #1: NEON Claims and Receives Reimbursement for Unallowable Costs

The FAO strongly believes that NEON and the NSF instituted the management fee with the sole intent to pay for unallowable costs. **The FAO stands by this condition** as written in the final draft before the final decision (see imbedded file below). The FAO is unpersuaded by the statements in the final decision. NEON has always and still does only bill its unallowable cost as they are incurred. The fact that they call it a fee does not change the facts.

SOCAR #6: NEON’s Treatment of Contingency Costs Does Not Comply with 2 C.F.R. Part 230, sub-bullet (3), Scope changes

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The FAO believes that NEON and the NSF are using contingency funds to pay for changes in scope. NEON informed the auditor of this fact. The RAM and DRD disagreed and stated the FAO needed technical assistance to make that determination. The technical assistance was actually requested numerous times, but never received. Therefore the audit opinion will contain a limitation. The FAO believes its procedures were sufficient to report the noncompliance.

(emphasis added)

Regardless, as noted above, Mr. Jones signed the final report as engagement partner under direct orders from senior DCAA management via Mr. McAfee and Ms. McKune. This proves beyond any doubt that Mr. Jones’s judgement had been subordinated (deliberately) by senior DCAA management because he signed an audit report that he himself admitted above that he believed to be incorrect.

October - November 2014: Extensive discussions with the Congress on the issues above.

13 November 2014: DoDIG (finally) provides a status update on some of my complaints via email as follows:

Complaint number 20140129-022038: Submitted to the DoD Hotline on January 28, 2014, concerning allegations that DCAA failed to comply with GAGAS in resolving audit disputes. After review by the Investigations of Senior Officials Directorate (ISO), the office of the Assistant Deputy Inspector General for Audit Policy and Oversight (APO) and the Office of the Deputy Inspector General for Auditing (Audit), this matter was referred to the DCAA Internal Review Directorate (IRD) for action.

Complaint number 20140307-023945: Submitted to the DoD Hotline on March 5, 2014, concerning allegations of misconduct by DCAA auditors during an audit of National Ecological Observatory Network. After review by ISO, APO, the Defense Criminal Investigative Service (DCIS) and the DoD IG Office of General Counsel (OGC), this matter was referred to the DCAA Internal Review Directorate (IRD) for action.

Complaint number 20140606-025797: Submitted to the DoD Hotline on June 5, 2014, concerning allegations that DCAA’s policy of not reporting suspected or actual fraud identified in audit reports violates GAGAS. After review by ISO and APO this complaint was closed.

Complaint number 20140606-025818: Submitted to the DoD Hotline on June 6, 2014, alleging misconduct by the DCAA IRD Director in exercising management authority over DCAA audit activity. After review by ISO, APO and the Office of the Assistant Inspector General for Investigative Policy and Oversight (IPO), this complaint was closed.

Complaint number 20140613-025948: Submitted to the DoD Hotline on June 12, 2014, alleging DCAA supervisors remain in positions of authority over you and audit findings

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regarding allowable pension costs were improperly removed from audit reports. After review by ISO and APO this complaint was closed.

Complaint number 20140929-027743: Submitted to the DoD Hotline on September 29, 2014, alleging misconduct by unknown persons at DCAA and reprisal. In accordance with Department of Defense Directives, your complaint was forwarded to the Directorate for Whistleblower Reprisal Investigations (WRI) for preliminary analysis. WRI reviewed your allegations and found insufficient basis to initiate an inquiry. Your complaint indicated you had already reported this matter to DCAA IRD so the complaint was closed.

The DoD Hotline will notify you when the two remaining open complaints are closed. At that time you will be provided instructions on how to submit a records request through the Freedom of Information Act (FOIA).

It is clear from the above that DoDIG is either one of the most incompetent investigative agencies in the history of that profession, or is deliberately being obtuse. As noted repeatedly above, DoDIG was told in a disclosure that DCAA IRD was compromised, at least in appearance, due to Ms. Janysek’s participation in the NEON engagement in a management capacity. Yet, despite this fact, DoDIG continued to refer complaints to IRD as if nothing was wrong. In doing so, DoDIG handed the very people that were retaliating against me related to the whistleblower disclosures specific details of the allegations I was making against them. Even Inspector Clouseau would recognize that something is wrong with this picture.

13 November 2014: I notify the Congress about the above:

Please see the information from DoDIG regarding my NEON and Colorado School of Mines complaints below. You will recall (and DoDIG notes below) that DCAA's Assistant Director for Internal Review (Angela Janysek) directly participated in management of the NEON audit, compromising her and her office's independent investigative status. She further communicated directly with then Deputy Director (now Director) Anita Bales, which made Ms. Bales fully aware of my status as a whistleblower. The subsequent retaliation was then a forgone conclusion.

However, DoDIG closed this allegation, without discussing the matter with me directly in any way. It then either closed or referred every complaint (with two exceptions) right back to DCAA-IRD. I do not believe that any faith can be placed in DoDIG if it passes the buck to the very people accused of the misconduct in question, putting them on notice of exactly what they are accused of, and who did the accusing. Frankly, DoDIG's conduct is, in and of itself, worthy of Congressional attention and possible action -- no whistleblower with two brain cells to rub together would trust the DoDIG after this conduct -- and that should seriously concern the Congress that relies on such whistleblowers to uncover Executive Branch misconduct.

13 November 2014: In response to intense political pressure regarding the abuse of management fees substantiated in the draft NEON audit and later disclosed to the Congress in my whistleblower disclosures,
Historically, NASA has discouraged the payment of profit or fee under its Federal Financial Assistance awards because payment in excess of costs is inconsistent with the intent of grants and cooperative agreements which provide funding in the form of financial assistance to recipients for their performance of a public purpose. For commercial firms, payment of profit or fee is specifically prohibited under NASA grants and cooperative agreements (See NASA Grant and Cooperative Handbook, Subpart 1274.204). Because this prohibition does not include non-profit organizations, NASA's policy has been misinterpreted and inconsistent application has occurred.

Therefore, this final rule extends the prohibition on the payment of profit or fee to all recipients of NASA grants and cooperative agreements, alleviating the misinterpretation and inconsistent application of the policy.

In essence, NASA saw what way the wind was blowing on management fees, and decided not to attempt to defend the indefensible.

**17 November 2014:** Following several conflicts with Mr. Eve regarding my Congressional work, I state to the Congress:

My supervisor Colin Eve stated to me a couple of weeks ago that he was concerned regarding the amount of time I had spent a particular week on the phone. I have been making phone calls related to the subject issue outside of the office because my phone calls from within the office were being overheard (even if I made them from a private office) and communicated within DCAA. He asked for me to name the persons to whom I was speaking, and I declined to do so, citing confidentiality and Congress's investigative authority. Nothing further was said on the topic.

However, I received a call from one of the committees that I have been communicating with on the subject issue this morning, which indicated that my current supervisor [Mr. Eve] had contacted the committee in regards to my communications with the Congress.

The fact that Mr. Eve and (it turned out) Mr. Rogers had actually contacted one or more committees of the Congress (including for certain the Senate Committee on the Judiciary) and demanded to know whether I was speaking to said committee(s) is misconduct of the highest order. It is none of those gentlemen’s business to whom in the Congress I am disclosing allegation as a whistleblower. Further, given the allegations above and below any reasonable person would likely conclude that the purpose of gathering this information had a nefarious purpose, however much Mr. Eve and Mr. Rogers insisted that it was purely for timekeeping purposes. However, in an attempt to avoid a conflict with my new supervisor and engagement partner, I informed the Congress that I would not make a major issue out of their
actions for now, and requested written documentation from the Congress for extensive use of official time in future to provide to Mr. Eve and Mr. Rogers to support my use of official time.

28 November 2014: I inquire of Ms. Janysek as to the status of the investigations into the false accusations to DCAA Security and the Wikipedia vandalism. Ms. Janysek responded:

As discussed in a 2 Oct 14 email response to you, the inquiry into the security related event was handled by management. The investigation into the Wikipedia event was completed earlier this week. The report in that case should be issued in the next couple of weeks. If you have any further questions, please let me know.

3 December 2014: The House Committee on Science, Space, and Technology holds a hearing on NEON. Witnesses are Ms. Lerner and Ms. Bales. Chairman Smith states in his opening statement:

Auditors discovered several highly questionable expenditures of taxpayer funds by NEON, including hundreds of thousand of dollars spent on lobbying, lavish parties, liquor …

These suspicious taxpayer-finance activities were not included in the audit submitted to the NSF Inspector General … but to his credit, the principal auditor J. Kirk McGill invoked the Whistleblower Protection Act to make sure that the Inspector General, Congress and ultimately the public was aware of hundreds of thousands of dollars of taxpayers’ dollars being spend on improper activities.

Mr. Smith’s statement was broadcast repeatedly by Fox News on Youtube and also on live television. Therefore, any person within the Government that was unaware that I was a whistleblower, was at the point Mr. Smith publically named me as the whistleblower in a public Congressional hearing.

12 December 2014: Chairman Smiths summons me to Washington (planned for early 2015) to assist in its investigation. A letter from Mr. Smith to Ms. Bales follows:
December 12, 2014

The Honorable Anita Bales
Director
Defense Contract Audit Agency
8140 Corporate Drive
Nottingham, Maryland 21236

Dear Director Bales:

The Committee on Science, Space and Technology requests that you make available Mr. J. Kirk McGill for an interview regarding the Defense Contract Audit Agency’s (DCAA) various examinations of the National Ecological Observatory Network, Inc. (NEON) and his referral of suspected fraud to the Office of the Inspector General – National Science Foundation (NSF) pursuant to 5 CFR § 2635.101(g)(11). This request is pursuant to the Committee’s jurisdiction under House Rule X.

The Committee deems Mr. McGill’s availability and the information in his possession critical to its oversight duties related to the NSF and NEON, the importance of which was stressed in your appearance before this Committee on December 3, 2014. The Committee notes Mr. McGill’s status as a protected whistleblower under 5 U.S.C. § 1201, as well as his official duties as a federal auditor.

There are other Committees and Congressional Members in both the House and Senate that have expressed an interest in interviewing Mr. McGill. It would be our intention to coordinate arrangements with the other interested Members and Committees, so as to avoid redundant requests for Mr. McGill’s appearance. We plan to contact Mr. McGill directly about setting up a date in January 2015 for his appearance in Washington, D.C. Our expectation is that one business day would be sufficient time to discuss the pertinent issues with Mr. McGill.

The Committee appreciates your continuing cooperation in this matter. If you have any questions, please contact Cliff Shannon (202.226.9783) or Tim Doyle (202.225.6917) of the Science Committee staff.

Sincerely,

[Signature]

Lamar Smith
Chairman
23 December 2014: I request access to the final NEON working paper package for two reasons 1) I wish to verify that my objections to the audit are properly documented and that my name does not appear on any document with which I disagree (you will recall from above that I later find out my name was left on many documents with which I disagree, and that all of the disputed findings were deleted, not superseded, in the working papers – making my concern very legitimate) and 2) to prepare for the early 2015 trip to DC to assist the Congressional investigators.

Although all auditors have access to all working papers at their FAO, Mr. Eve specifically ordered me not to access the working paper package for NEON under threat of disciplinary action.

There is no basis in rule, law, or regulation for Mr. Eve's order not to access the final NEON working paper package. Therefore, a reasonable person could conclude that the most likely reason for Mr. Eve's actions was to deny me access to the working papers package in order to cover up the improper deletion of the disputed audit findings, and the fact that my signature was affixed, without my knowledge or permission to documents in the working paper package with which I completely disagreed. This is nothing less than forgery, and Mr. Eve's actions would have prevented me from discovering this potentially criminal offense had I not deliberately violated his illegal order in accordance with 5 U.S.C. § 2302(b)(9)(D) and accessed the working paper package anyway.

Mr. Eve has never rescinded his order.

13-15 January 2015: Per Chairman Smith’s request, I report to DC and assist Congressional investigators.

22 January 2015: Following further attempts by Mr. Eve to delve into my contact with the Congress, I schedule another phone call with Ms. Janysek to discuss that matter and several other outstanding issues, and summarize the call in an email to her afterwards (Note: as of this date Ms. Janysek was now Ms. Janysek-Denzler and IRD had become the DCAA Inspector General (“DCAA-IG”):

Thank you for taking the time to discuss the subject issue with me today. A brief summary (not in chronological order) follows, and includes some topics not discussed during the phone conversation that I wish to bring to your attention now:

*I stated that both I and members/committees/staff of the Congress had concerns related to the level of oversight of my contact with the Congress and the IGs by my new supervisor (Colin Eve, Colin.Eve@dcaa.mil) and FAO Manager (Brett Rogers, Brett.Rogers@dcaa.mil). Mr. Rogers and Mr. Eve required that I provide additional information to them in order to grant me official time to work with the Congress, regardless of the blanket requests for my assistance already provided to the Agency Director. While I believe that Mr. Rogers and Mr. Eve are acting in good faith in an attempt to carry out their duty to supervise my activities, some of the actions they have taken are nevertheless objectively inappropriate and could and indeed have created an appearance of undue interference in protected activities (e.g. whistleblower disclosures). Specifically, I noted or note now the following concerns:

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1) Mr. Eve requested a list of all committees/members to whom I was speaking, including designation of a point of contact. I provided this information against my better judgment out of a desire to not appear to be acting inappropriately.

2) Mr. Rogers and Mr. Eve subsequently contacted at LEAST two Congressional committees directly by telephone (the Senate Committee on the Judiciary and the House Committee on Science, Space, and Technology) to request details of my contact with them, including estimates of how much time would be required in future; confirmation of when I was speaking or doing work for those committees/members; and to request verification by phone or email from those committees/members and/or their staffs prior to me performing work for them in future. Neither Mr. Rogers nor Mr. Eve notified me prior to taking this action, I only learned about it when Congressional investigators contacted me concerned that the actions were the prelude to possible whistleblower reprisal, obstruction of Congressional proceedings, or at the very least undue interference with a protected whistleblower. Both Mr. Rogers and Mr. Eve had been provided copies of the official requests for my assistance from the various members and committees as well as Regional Director Graff’s instruction to provide my full cooperation.

3) Mr. Eve has expressed concern regarding my speaking to Congressional contact while not physically present at the office. Because our office has no secure space where conversations cannot be overheard (every office and conference room is not even close to soundproof), I have been forced to make phone calls to Congress, you, and other oversight bodies (DoDIG, NSF-IG) from my home, car, or outside to avoid being overheard. Given that such conversations have previously been reported to DCAA management in direct violation of the confidentiality requirements of rule and law when made from within the building (as evidenced by DCAA management's possession of information when discussing the matter with Congress that they can only have got by someone listening in to my conversations), I believe my concerns regarding privacy and my right to confidentially communicate with oversight authorities in the course of my official duties (i.e. on the clock) would be compromised by requiring all such calls to be made while physically at work. While I have endeavored to make the calls on site from my car or while walking, those that require me to have access to my DCAA computer and an internet connection can really only be made from home. I have an active telework agreement, but Mr. Eve is reticent about approving blanket telework on those days that I need to discuss matters confidentially. It would be helpful to have a more liberal use of telework until this situation is resolved.

4) Mr. Eve has ordered that prior to performing work for the Congress, IGs, or any other oversight authority I have that authority provide him notification that I will be performing such work in advance via telephone or email. I noted during our conversation that even this limited knowledge (who I am talking to

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and when I am talking to them) is often sensitive, and those authorities are very concerned about releasing that information -- some indeed have refused to do so. I have been instructed by those authorities to make reference to the general requests for my assistance made previously, most importantly the previously mentioned letter from the Chairman of the House Committee on Science, Space and Technology to Director Bales last year and the corresponding instructions from Central Region Director Graff to fully cooperate with that request. However, those general citations have been insufficient to satisfy Mr. Rogers and Mr. Eve.

*Per your direction, I will be submitting one or more whistleblower reprisal complaints using the form on the DCAA-IG webpage. I stated that hard evidence of retaliation was lacking since all parties allegedly partaking in the reprisals were careful not to put anything in writing or, in many cases, to make statement with any witnesses present. You responded by requesting that I state in the complaint(s) who does or could have information related to each specific allegation so that DCAA-IG could avoid having to question everyone even tangentially involved and wasting time and taxpayer money. I also noted that some of the early reprisal issues have already been communicated to the DoDIG, including through my DCIS interview. I finally stated that taken independently many of the allegations of reprisal did not appear sufficiently supported, or material; however, I asserted that when taken together they form a very damning picture.

*I requested and you agreed to inform Mr. Rogers and/or Mr. Eve that I would be working with DCAA-IG on these matters, so that I could justify the time expended in my timecard.

*After I got off the phone with you, I spoke with Mr. Eve to give him a heads up on the time I would need to work on these issues. Mr. Eve once again expressed frustration that he was expected to sign off on my timecard but could not verify what I was working on and had no clear guidance as to what actions he should be taking. After discussion, we thought it was worth inquiring whether someone from the IG could be responsible for substantiating time expended related to these issues. This would relieve Mr. Eve of his responsibility to substantiate the use of time related to these issues, and would also eliminate the issues being created when he attempts to do so.

*Mr. Eve also once again expressed grave concern regarding the time I have been and expect to continue expending on this issue because he, not unjustifiably, views it as a drain on the time I could spend doing work for his team and for which he receives no benefit. I sympathize with Mr. Eve's predicament, but obviously this matter is (and should be) my top priority given the seriousness of the allegations and the potential impact not only on the taxpayer, but on this Agency's long-term reputation in Washington and in the eyes of the public. Therefore, if something can be done to get Mr. Eve out of this predicament without continuing to threaten my ability to confidentially communicate with the oversight authorities and the Congress I think it is worth exploring. I am spending way too much time fighting for the time I need to legitimately address these issues, and not enough time to

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actually doing the addressing. That does not make the Agency look good, and frankly we don't need any help making ourselves look bad right now.

*I stated that I would be submitting a formal complaint to the Colorado State Board of Accountancy (a division of the Colorado Department of Regulatory Agencies) regarding the alleged misconduct by CPAs on the NEON engagement. You confirmed that I have and will continue to direct the Board's inquiries for supporting documentation through the proper chain of command. I also noted that the Board may bring in other states directly or through the National Association of State Boards of Accountancy ("NASBA").

*I will likely also submit a complaint to the Colorado Society of CPAs, of which I am a member.

*I stated that the AICPA and/or the Board had concerns related to DCAA's compliance with the AICPA's Code of Professional Conduct. These concerns include, but are not limited to:

1) DCAA's entire command structure insofar as DCAA's engagement partners (FAO Managers) are directly subordinate to its reviewing partners (Regional Audit Managers) and RAMs can (as evidenced by Mr. McAfee's actions) order FAO Managers to sign reports with which they disagree -- which is what happened at Arthur Andersen and is pretty much the worst ethical violation a CPA can commit these days;

2) DCAA's lack of training on the Code, including the fact that no non-CPA's in the Agency receive any training on the code, and at least some CPA's are not aware that the Code applies to them -- I noted that every single auditor in DCAA is subject to the code either by operation of the law of the state in which they are licensed (if they are a CPA), membership in the AICPA (regardless of whether they are a CPA), or because they work for a person subject to the Code (e.g. Director Bales, who is an licensed, albeit inactive, CPA);

3) The fact that FAO Managers Jones signed the NEON report even though he documented that he disagreed with the report in the working papers, in direct violation of the Code which prohibits any person subject to the Code from signing a document they believe contains "materially false or misleading information". Because Mr. Jones stated he thought the report was wrong, he by definition believed it contained false or misleading information. Mr. Jones is a CPA licensed in Colorado and is, therefore, subject to the Code by Colorado law, which requires compliance with the Code by all Colorado CPAs;

4) As noted above, the fact that RAM McAfee ordered Mr. Jones to sign the audit report, over his objections. Mr. McAfee is a CPA licensed in the state of Texas, and is subject to the Code by Texas law, which requires compliance with the Code (or the Texas equivalent) by all Texas CPAs.
*You stated that DCAA-IG/IRD conducted an inquiry into the DCAA resolution of disagreements process as specifically applied during the NEON engagement, and a report on that subject will be forthcoming following the applicable edits and reviews. You stated you would personally inform me upon the completion of that report. I noted that the compliance of DCAA's disagreements process with the Code is likely to be a major issue, and strongly suggested that it be considered before completing the report.

*We discussed in general terms the various happenings related to the NEON engagement, including the role that DCAA-IG might be able to play in the matter. While you stated that some of the issues were doubtless outside of your purview, you indicated that you would consider the scope of your authority in relation to the facts of this matter during DCAA-IG training. You further stated that once you received the reprisal complaints, they would go through DCAA-IG's review process and you would personally determine whether further action was justified. You stated that if you chose to proceed, I would be contacted by you or your staff to be interviewed and have the opportunity to provide further information. I noted that my primary reason for involving DCAA-IG is to ensure that at least someone in the Agency is aware of the happenings at the oversight and Congressional level to the extent I am free to share those goings on.

*I stated that I had accused DCAA Deputy General Counsel David Hoffman of civil and criminal misconduct related to the "legal opinion" he provided in response to the DCAA Form 2000 I filed with the NSF-IG. I noted that Mr. Hoffman stated in an email sent to NSF-IG Lerner that no fraud had occurred, despite having no authority in rule or law to make such a determination on a criminal matter, and also in doing so arguably interfering with and undermining my ability to make a referral of possible fraud to the cognizant inspector general. I therefore cautioned against any involvement of the DCAA Office of the General Counsel in any aspect of this matter because it is most certainly compromised in appearance, and (in my opinion) also in fact related to this matter specifically, and anything to do with me generally. You stated that sufficient safeguards were in place to mitigate the problem by dealing with one particular person with the OGC.

*As an additional item, I wanted to check in on the status of the Wikipedia investigation that we previously discussed. You indicated that the report was substantively completed and currently going through legal review. The applicable oversight committees of the Congress have been fully briefed on my side of the matter and have been notified that they can request a copy of your report through the usual channels once it is completed, but I would nevertheless appreciate an update.

I think this pretty much covers the highlights. If there are any additional items you think worthy of inclusion or any clarification or correction to any of the above, please let me know. Otherwise I will plan to complete the whistleblower reprisal complaints by early next week.

Note: All issues with Mr. Eve from this point forward will be handled under a different disclosure under separate cover as they quickly move beyond NEON and CSM.

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2 February 2015: In response to a Freedom of Information Act request, DCAA management provides a copy of the DCAA-IG report into the Wikipedia vandalism. The report concludes that a DCAA employee did commit the vandalism, but DCAA Assistant Director J. Philip Anderson redacts the name, grade, title and location of the offending employee and refuses to confirm whether the employee is a junior employee (whose name may very well be protected from disclosure) or a senior employee (whose name is likely required to be released under the Act when substantiated allegations of misconduct are being levied against said employee).

Further, the report only concludes that the employee in question has misused Government resources. No mention is made of DCAA-IG even inquiring into possible whistleblower retaliation, despite me mentioning it to Ms. Janysek-Denzler repeatedly (as documented above).

DCAA’s deliberate violation of the Freedom of Information Act to cover up wrongdoing by a DCAA employee, perhaps even a senior employee I have already accused of wrongdoing (a forensic computer examination of the redacted documented projects a better-than-fifty-percent chance that the redacted employee is Jerry McAfee – which would render the decision to redact shocking misconduct) is sufficiently serious to be worth its own disclosure more fully exploring the issues, which will be made under separate cover.

For our purposes here, it is sufficient to note DCAA’s highly questionable actions.

Note: I did and have not received any information regarding the outcome of “management’s” investigation into the false report(s) to Security discussed above.

1-3 February 2015: I again report to DC to support Congressional investigators, and to support the second hearing on NEON scheduled for 2 February 2015.

17 April 2015: The NSF issues a final policy on management fees, banning their use for alcohol, lobbying, parties, and the other unallowable expenditures documented in the draft report approved by Mr. Jones. The House Committee on Science, Space, and Technology introduces legislation to ban these expenditures as a matter of law.

Mid-April 2015: The Office of Management and Budget (“OMB”) issues a “Controller Alert” which states:

Agency policy or guidance also should include examples of inappropriate uses of management fees or profit such as purchase of alcoholic beverages, entertainment, meals for non-business purposes, membership dues for social or sporting clubs, and lobbying. Management fees should not be used to circumvent statutory or other limitations included in the terms and conditions of the award on otherwise allowable costs.

Therefore, OMB effectively adopts the draft NEON findings on the management fees and applies them to the entire Government.

After due consideration, I conclude that the OMB, NSF and NASA action fully vindicates Mr. Jones’s position as engagement partner, and further calls into question DCAA management’s actions on the matter.
IV. Allegations Against Specific Government Officials

Based on the information above, I conclude that the following officials may have committed criminal, civil, or professional misconduct worthy of further investigation.

- DCAA Director (Retired) Patrick Fitzgerald
- DCAA Deputy Director/Director Anita Bales
- DCAA Assistant Director/Inspector General Angela Janysek-Denzler
- DCAA Assistant Director Donald McKenzie
- DCAA Assistant Director J. Philip Anderson
- DCAA Deputy General Counsel David Hoffman
- DCAA Regional Director Diana Graff
- DCAA Deputy Regional Director Martha McKune
- DCAA Deputy Regional Director (Retired) William Adie
- DCAA Regional Audit Manager (concurring partner)/Headquarters Chief Jerry McAfee
- DCAA Regional Audit Manager Kevin Hampton
- DCAA FAO Manager Brett Rogers
- DCAA Supervisory Auditor Michael Quant
- DCAA Supervisory Auditor Colin Eve

Further, I conclude that the following officials may also have committed criminal or civil misconduct worthy of further investigation by virtue of signing an audit report that they themselves state in writing they believe is false.

- DCAA Field Audit Office Manager (engagement partner) Allen Jones
- DCAA Assistant for Quality Angie Vaill
- DCAA Auditor Kate Blom

Finally, I conclude that the following Government agencies conduct are worthy of further investigation based on the information above:

- Defense Contract Audit Agency
- Department of Defense Inspector General
- National Science Foundation Inspector General
- Office of Naval Research

Finally, I conclude that the following contractors/grantees conduct are worthy of further investigation based on the information above:

- The Colorado School of Mines
- The University of Colorado
- The National Ecological Observatory Network

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Note: allegations against other officials, or different allegations against these officials, may very well be justified. This listing is simply a summary of those persons who are, in my opinion, most implicated by the information above.

V. Conclusions
At bottom, there can be little doubt that material misconduct by senior Government official occurred based on the information above. While explanation may be possible for individual issues in isolation, in the aggregate, no reasonable explanation is possible.

While there is no doubt in my mind that my own conduct is subject to legitimate criticism on specific issues, I note that I am 28 years old and in way over my head. I can, however, say with absolute certainty that I have tried my best to comply with what I believed to be the ethically and legally correct course of conduct all times during this process – and insofar as I failed to do so, I failed in good faith and whilst always striving to do the right thing.

The same cannot be said of many others described above.

Respectfully submitted,

J. Kirk McGill

Mr. Joshua Kirk McGill - CPA, CFE, CIA, CMA, CISA, Cr.FA, CFC, CGAP, CGMA; M.S. Acct.
Senior Federal Auditor
United States Department of Defense

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WHISTLEBLOWER DISCLOSURE PURSUANT TO 5 U.S.C. § 2302
OF ALLEGATIONS RELATED TO SUSPECTED:
VIOLATIONS OF LAW, RULE, AND/OR REGULATION,
ABUSE OF AUTHORITY, AND GROSS MISMANAGEMENT

REVISION 04

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it in accordance with your organizations security policies.
Allegation:
That the Defense Contract Audit Agency is not independent and does not comply with the Integrity & Objectivity Rule when performing Attest & Nonattest Services, in violation of Generally Accepted Government Auditing Standards, the Statements on Standards for Attestation Engagements, and the Code of Professional Conduct of the American Institute of Certified Public Accountants; and, that DCAA Management knew or should have known of these issues, failed to take appropriate action to resolve them and, in doing so, created a situation which its employees were required to either violate rule, law, regulation and/or the professional standards for accountants and auditors, or refuse to work on their assigned tasks – actions by DCAA Management which constitute Gross Mismanagement & an Abuse of Authority.

Date of Original Disclosure & Referral:
Monday 20 April 2015

Date of Revision 01: Wednesday 22 April 2015
Date of Revision 02: Thursday 23 April 2015
Date of Revision 03: Thursday 24 April 2015
Date of Revision 04: Monday 27 April 2015

Principal Disclosing & Referring Official:
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Parties Directly Involved:
United States Federal Government
Executive Branch Departments & Agencies:
United States Department of Defense (“DoD”)
Office of the Inspector General (“DoDIG”)
Defense Contract Audit Agency (“DCAA”)
Headquarters (“HQ”)
Office of the Inspector General (“DCAA-IG”)
Central Region Office (“Central Region”)
Field Office No. 03121 - Denver Branch Office (“DBO”)
Field Office No. 03151 - Rocky Mountain Branch Office (“RMBO”)

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Alleged Rule, Law or Regulation Violated:
- Governmental Accountability Office
  - Generally Accepted Government Auditing Standards
- American Institute of Certified Public Accountants
  - Statements on Standards for Attestation Engagements
- Code of Professional Conduct
- 18 U.S.C. § 1001 (would be violated if the undersigned obeyed the order to work on his assigned tasks)
- 5 CFR § 2635.101 (would be violated if the undersigned obeyed the order to work on his assigned tasks)
I. Introduction

My name is J. Kirk McGill. I have at present the honor to be a Senior Federal Auditor with the United States Department of Defense - Defense Contract Audit Agency (“DCAA” or the “Agency”) currently assigned to the Rocky Mountain Branch Office (“RMBO”).

During the course of my employment with DCAA, information has come to my attention that strongly suggests that DCAA is not independent of its primary client, the United States Department of Defense, in violation of the independence requirements of Generally Accepted Government Auditing Standards (“GAGAS”). Further, this lack of independence generates threats to DCAA’s independence and also our compliance with the Integrity and Objectivity Rule under the Code of Professional Conduct (the “Code”) and Statements on Standards for Attestation Engagements (“SSAEs”) of the American Institute of Certified Public Accountants (“AICPA”).

If substantiated, these allegations call into serious question DCAA’s conduct insofar as it has and continues to hold itself out as an “independent auditor” and issues “audit reports” that state it has fully complied with GAGAS. As claiming independence when independence has in fact been compromised (or objectivity and integrity when either has been compromised) is considered by many in the accounting profession to be the ultimate act of professional misconduct by an auditor, I am required by law and the rules of the profession to bring the matter to the attention of the appropriate authorities.

If substantiated, these allegations bring into question DCAA’s compliance with the most fundamental principle of the auditing profession -- which has serious implications not only for DCAA, but for any entity which has or intends to rely on DCAA’s reports.

The purpose of this disclosure is to communicate the facts and circumstances of this case to the appropriate parties so that action can be taken to address the situation if any of my concerns ultimately prove valid.

II. Background – DCAA

The Defense Contract Audit Agency is an agency of the United States Department of Defense under the direction of the Under Secretary of Defense (Comptroller). It was established in 1965 to perform all contract audits for the Department of Defense. Previously, the various branches of military service were responsible for their own contract audits.

The DCAA's duties include financial and accounting advisory services for the Department of Defense in connection with negotiation, administration and settlement of contracts and subcontracts. To a lesser extent, it also performs audits for other federal agencies.

As of 30 September 2013, DCAA had 4,933 employees, located at more than 300 offices throughout the United States, Europe, Asia, and in the Pacific. This workforce consisted of 4,334 auditors and 599 support staff. Most senior DCAA officials are Certified Public Accountants, although many line auditors are not. Almost all DCAA management officials are auditors, including the DCAA Director, Deputy Director, Regional Directors, and Deputy Regional Directors.

The Agency provides standardized contract audit services for the Department of Defense, as well as accounting and financial advisory services regarding contracts and subcontracts to all DoD components.
responsible for procurement and contract administration. These services are provided in connection with
negotiation, administration, and settlement of contracts and subcontracts.

DCAA also provides contract audit services to other government agencies, as well as other countries under
the Foreign Military Sales program, on a reimbursable basis. The largest non-DoD agency for which DCAA
performs audits is the National Aeronautics and Space Administration ("NASA") primarily since the same
government contractors do substantial business with both DoD and NASA, especially on major programs.

Defense contract audits are performed in accordance with Government Auditing Standards, usually referred
to as Generally Accepted Government Auditing Standards ("GAGAS"). These standards, colloquially
referred to as the "Yellow Book" (because of the color of the cover of the physical publication), are
published by the Comptroller General of the United States who sits at the Governmental Accountability
Office ("GAO") Polices and guidelines more specific to defense contract auditing are detailed in the
Defense Contract Audit Manual, a continuously updated online publication of the DCAA.

The objective of a contract audit is to express an opinion, in the form of an independent auditor's report, on
an assertion by a contractor, for purposes of supporting decision making by the Government. Common
assertions include issues such as the propriety of costs billed to the Government under a contract, the
adequacy of a contractor's internal control over accounting and billing on Government contracts, a
contractor's compliance with rule, law, and the terms of contracts and agreements, and the reasonableness
of a contractor's estimates in a contract proposal. These engagements involves evaluation of the contractor's
policies, procedures and other internal controls over contract costs, and examining samples of supporting
records for individual transactions.

A report released by the Government Accountability Office (GAO) on 23 July 2008 alleged that DCAA
managers threatened a senior auditor with personnel action if he did not remove negative findings from a
report criticizing a large federal contractor. The report found a too-cozy relationship between management
at the DCAA and some of the contractors they are assigned to audit, including Boeing. GAO also said
auditors who complied with the investigation were subject to harassment and intimidation from their
supervisors.

The DCAA responded on 25 July 2008 that it had asked the Department of Defense Inspector General
(“DoDIG”) office to investigate the GAO's claims. "We take the GAO report very seriously," said April
Stephenson, DCAA's director. United States Senator Claire McCaskill said GAO may have uncovered the
"biggest auditing scandal in the history of this town," and asked the DoD to immediately fire the supervisors
cited in the report.

The Associated Press reported that a May 2008 audit of Bechtel Group, supervised by DCAA regional
director Christopher Andrezze, showed a "chronic failure" by Bechtel to produce the required
documentation for the audit. In spite of this, DCAA issued a report rating Bechtel's internal accounting
procedures as "adequate," a passing grade which meant DoD auditors could ease up on the company. The
DCAA report did not mention the company's failure to produce the required documentation.

A GAO report in September 2009 found that agency auditors failed to follow "basic auditing standards" in
65 of 69 audits. In its report, the GAO noted that the agency lacks sufficient independence from the

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contractors and the DoD agencies doing business with those contractors. The GAO concluded that pressure from outside groups creates a hostile work environment in which audit reports are falsified to appease contractors. In response to the GAO report, Senator Joe Lieberman said, “Perhaps it’s time for us to consider separating DCAA from the Department of Defense and … making it an independent auditing agency” (emphasis added). No structural changes to DCAA in relationship to DoD occurred.

The DoD IG released a report of its investigation into the agency on 31 August 2009. It found that the DCAA has an "environment not conducive to performing quality audits." An audit of Boeing was cited in which the company was allowed to keep $217 million in taxpayer's money, because a DCAA regional auditor did not perform his/her duties properly. When Boeing was unresponsive to a request for information, the regional auditor ordered a subordinate to change the audit report in Boeing's favor. Senator Tom Coburn stated "It's atrocious" about the agency in response to the report, "several of those people ought to be fired." Added Senator Claire McCaskill, "this report is just further confirmation that DCAA is fundamentally broken. I certainly hope the Department of Defense takes these accusations seriously. As I said before, if somebody is not held accountable for the shoddy audits the DCAA has produced, nobody should take this agency or their work seriously in the future." DCAA Director April Stephenson stated in the IG report that her agency concurred with the IG's recommendations.

In the wake of the investigations, Stephenson was unilaterally removed from her position as director of the agency by DoD Comptroller Robert Hale and reassigned to Hale's staff effective 9 November 2009. She was replaced by Patrick Fitzgerald, previously the Auditor General of the United States Army Audit Agency. Fitzgerald was replaced by his long-time number two at DCAA (and the Army Audit Agency) Anita Bales in late 2014.

On 18 September 2014, top DCAA management was accused of “whitewashing” an audit of the National Ecological Observatory Network (NEON), a $500 million National Science Foundation (NSF) climate change research project. An initial DCAA audit concluded that NEON and the NSF had conspired to use taxpayer funds to pay for extravagant Christmas parties, alcohol, lobbying, and foreign travel under the guise of a sham “management fee”. The audit found that the NSF and NEON had created the “management fee” for the explicit purpose of evading Federal regulations that prohibit the use of Federal funds for such expenses; an allegation supported by a 2008 letter from NEON to the NSF requesting funds specifically to spend on “unallowable” expenses. The initial audit was approved by two levels of DCAA management, but was overruled by DCAA's top management, including Director Bales, which approved the use of funds – claiming that the designation of the expenditures as “management fees” prevented it from disallowing the expenses. A whistleblower at DCAA brought both the initial audit findings and allegations of a cover up by DCAA management to Senators Charles Grassley (R-IA) and Rand Paul (R-KY), who are jointly investigating the matter. House Committee on Science, Space and Technology Chairman Lamar Smith publically revealed the name of the whistleblower in a hearing on 3 December 2014 as J. Kirk McGill (i.e., me), and at least half a dozen other Congressional committees are involved in the matter along with at least four different Inspectors General. In mid-April 2015, the Office of Management and Budget (“OMB”) confirmed my findings were correct, and in doing so implied that DCAA’s findings to the contrary in removing them from the report was improper.

As a result of these revelations, DCAA finds itself in a similar situation to 2008/2009 where its fundamental integrity as an independent audit agency is in question.

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I am in the process of preparing a disclosure on the specific incident described above regarding NEON. The purpose of this disclosure is more general, and will address the ‘big picture’ independence issues at DCAA, rather than the details of specific incidents. To put it another way, this disclosure is concerned with the alleged violations of the independence framework and Integrity and Objectivity Rule, rather than the alleged misconduct by DCAA management that resulted from those violations.

III. DCAA’s Compliance with the Independence and Objectivity & Integrity Rules

(a) Applicability of Independence Frameworks to DCAA

Practitioners (called “auditors” by GAGAS) performing attestation engagements are always required to be independent from party or parties responsible for the subject matter. The Code (cited as “ET”) creates a framework for evaluating threats to independence for members in public practice. “Public Practice” “[c]onsists of the performance of professional services for a client by a member or member’s firm.” (ET § 0.400.42) “Professional Services” “[i]nclude all services requiring accountancy or related skills that are performed by a member for a client, an employer, or on a volunteer basis. These services include, but are not limited to accounting, audit and other attest services …” (ET § 0.400.40).

Preliminarily, we must determine whether DCAA is subject to the Code. I conclude that it is. Clearly the Code applies to DCAA employees, such as me, who are members of the AICPA. However, SSAE (cited as “AT”) No. 101 applies the independence requirements of the Code to all auditors (as noted above, what the AICPA calls “practitioner”) performing attest engagement:

The practitioner must maintain independence in mental attitude in all matters relating to the engagement. (AT § 101.35)

The profession has established, through the AICPA's Code of Professional Conduct, precepts to guard against the presumption of loss of independence … Insofar as these precepts have been incorporated in the profession’s code, they have the force of professional law for the independent practitioner. (AT § 101.38) (emphasis added)

The next logical question, then, is whether DCAA is subject to the SSAEs. I conclude that it is. GAGAS § 2.09 states:

GAGAS incorporates by reference the AICPA’s Statements on Standards for Attestation Engagements (SSAE). (emphasis added).

Therefore, it is unequivocally clear that DCAA is required to comply with the independence requirements of the Code, the SSAEs and GAGAS when performing its attestation engagements.¹

¹ Note that DCAA is not covered by ET § 1.000.02 because we do not perform audits upon the Government, but rather for the Government.

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(b) **GAGAS Independence Requirements Generally**

GAGAS contains requirements related to independence for government auditors such as DCAA.

In all matters relating to the audit work, the audit organization and the individual auditor, whether government or public, must be independent. (GAGAS § 3.02)

Independence includes both “Independence of Mind”:

The state of mind that permits the performance of an audit without being affected by influences that compromise professional judgment, thereby allowing an individual to act with integrity and exercise objectivity and professional skepticism. (GAGAS § 3.03(a))

and “Independence in Appearance”:

The absence of circumstances that would cause a reasonable and informed third party, having knowledge of the relevant information, to reasonably conclude that the integrity, objectivity, or professional skepticism of an audit organization or member of the audit team had been compromised. (GAGAS § 3.03(b)).

To put it another way, GAGAS requires both independence in fact, and the perception of independence by reasonable and informed third parties.

Auditors and audit organizations maintain independence so that their opinions, findings, conclusions, judgments, and recommendations will be impartial and viewed as impartial by reasonable and informed third parties. Auditors should avoid situations that could lead reasonable and informed third parties to conclude that the auditors are not independent and thus are not capable of exercising objective and impartial judgment on all issues associated with conducting the audit and reporting on the work. (GAGAS § 3.04)

Because independence has the greatest effect on the perception of an audit organization’s integrity by third parties, the appearance of a lack of independence is just as dangerous (or, indeed, more dangerous) than actual misconduct that occurs as a result of an actual lack of independence. This is especially true of DCAA, which is supposed to serve as the independent compliance auditors for the entire Department of Defense and which issues thousands of audit reports covering billions of dollars in expenditures each year. We are often the first, last, and only line of defense for improper expenditure of taxpayer money.

GAGAS states:

Threats to independence may be created by a wide range of relationships and circumstances. Auditors should evaluate the following broad categories of threats to independence when threats are being identified and evaluated:

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a. Self-interest threat - the threat that a financial or other interest will inappropriately influence an auditor’s judgment or behavior;

b. Self-review threat - the threat that an auditor or audit organization that has provided nonaudit services will not appropriately evaluate the results of previous judgments made or services performed as part of the nonaudit services when forming a judgment significant to an audit;

c. Bias threat - the threat that an auditor will, as a result of political, ideological, social, or other convictions, take a position that is not objective;

d. Familiarity threat - the threat that aspects of a relationship with management or personnel of an audited entity, such as a close or long relationship, or that of an immediate or close family member, will lead an auditor to take a position that is not objective;

e. Undue influence threat - the threat that external influences or pressures will impact an auditor’s ability to make independent and objective judgments;

f. Management participation threat - the threat that results from an auditor’s taking on the role of management or otherwise performing management functions on behalf of the entity undergoing an audit; and

g. Structural threat - the threat that an audit organization’s placement within a government entity, in combination with the structure of the government entity being audited, will impact the audit organization’s ability to perform work and report results objectively.

(GAGAS § 3.14)

This disclosure (as to GAGAS) will ultimately focus on Undue Influence Threats, with reference to other threats that contribute to and/or underlie the Undue Influence Threats identified herein.

GAGAS states:

Circumstances that result in a threat to independence in one of the above categories may result in other threats as well. For example, a circumstance resulting in a structural threat to independence may also expose auditors to undue influence and management participation threats. (GAGAS § 3.15) (emphasis added)

The highlighted passage above is the primary thrust of this disclosure.
(c) GAGAS Independence Requirements as Applied to DCAA

GAGAS § 3.27 states:

The ability of audit organizations in government entities to perform work and report the results objectively can be affected by placement within government … The independence standard applies to auditors in government entities whether they report to third parties externally (external auditors), to senior management within the audited entity (internal auditors), or to both.

Therefore, the first determination that must be made is whether DCAA is an external audit entity, or in internal audit entity. I conclude that they are an internal audit entity, performing solely external audits.

Department Defense Directive No. 5105.36 (4 January 2010) states:

DCAA is a Defense Agency under the authority, direction, and control of the Under Secretary of Defense (Comptroller) (USD(C))/Chief Financial Officer (CFO)

There is no doubt that an audit entity which is under the authority, direction and control of a Chief Financial Officer is an internal audit entity because it reports to a member of management.

GAGAS § 3.32 unequivocally supports this conclusion:

When internal audit organizations perform audits of external parties such as auditing contractors or outside party agreements, and no impairments to independence exist, the audit organization can be considered independent as an external audit organization of those external parties.

Thus, DCAA is required to be independent as an external auditor to the contractors that we audit, and independent as an internal auditor to DoD management, our primary client and the entity to which we report. As such, the structural requirements for external auditor independence are not applicable to our relationship to DoD because we are not an external auditor to DoD – conversely, we are part of DoD.

(i) DCAA’s Compliance with GAGAS External Auditor Requirements

However, it is worthy of note before we more on that that if we were required to follow the external auditor independence requirements, we would utterly fail to do so. GAGAS requires that an audit entity meet either a set of primary requirements, alternative requirements, or safeguards. The primary requirements are that the entity is:

a. at a level of government other than the one of which the audited entity is part (federal, state, or local); for example, federal auditors auditing a state government program; or

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b. placed within a different branch of government from that of the audited entity; for example, legislative auditors auditing an executive branch program.

(GAGAS § 3.28)

Because the entities we audit are not governmental at all, and our clients (meaning the Government entities who engage our professional services) are all in the same branch of Government (the Executive) as DCAA, these requirements are clearly inapplicable, and we proceed to the alternative requirements.

Safeguards other than those described above may mitigate threats resulting from governmental structures. For external auditors or auditors who report both externally and internally, structural threats may be mitigated if the head of an audit organization meets any of the following criteria in accordance with constitutional or statutory requirements:

a. directly elected by voters of the jurisdiction being audited;

b. elected or appointed by a legislative body, subject to removal by a legislative body, and reports the results of audits to and is accountable to a legislative body;

c. appointed by someone other than a legislative body, so long as the appointment is confirmed by a legislative body and removal from the position is subject to oversight or approval by a legislative body, and reports the results of audits to and is accountable to a legislative body; or

d. appointed by, accountable to, reports to, and can only be removed by a statutorily created governing body, the majority of whose members are independently elected or appointed and are outside the organization being audited.

(GAGAS § 3.29)

DCAA fails to comply with any of these requirements. The DCAA Director is subject to unilateral appointment and removal by the Under Secretary of Defense (Comptroller), as demonstrated in 2009 when Comptroller Robert Hale unilaterally removed DCAA Director April Stephenson from her position and unilaterally appointed Army Audit Agency head Patrick Fitzgerald to replace her. The Comptroller does not require approval from a legislative or independent body. Contrast this with 1st-tier inspectors general (such as the DoD Inspector General) which can only be appointed by the President of the United States with the advice and consent of the Senate, and can only be removed by the President, with notification provided to Congress; and 2nd-tier inspectors general (such as the National

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Science Foundation Inspector General) which report to an independent board (the National Science Board in the case of the NSF-IG).

Therefore, we fail to meet any of the alternative standards, and we move on to the final safeguards. GAGAS § 3.40 states:

In addition to the criteria in paragraphs 3.28 and 3.29, GAGAS recognizes that there may be other organizational structures under which external audit organizations in government entities could be considered to be independent. If appropriately designed and implemented, these structures provide safeguards that prevent the audited entity from interfering with the audit organization’s ability to perform the work and report the results impartially. **For an external audit organization or one that reports both externally and internally to be considered independent under a structure different from the ones listed in paragraphs 3.28 and 3.29, the audit organization should have all of the following safeguards** … (emphasis added)

- a. statutory protections that prevent the audited entity from abolishing the audit organization;

DCAA fails to meet this requirement. DCAA is established by DoD Directive No. 5105.36, which is signed by the Deputy Secretary of Defense. It can, therefore, be abolished by DoD at any time and lacks any statutory authority whatsoever.

- b. statutory protections that require that if the head of the audit organization is removed from office, the head of the agency reports this fact and the reasons for the removal to the legislative body;

DCAA fails to meet this requirement. There is no statutory notification requirement to Congress for the removal of a DCAA Director. This is fundamentally different than the removal process for an inspector general. 5 U.S.C. App. § 3(b) requires that Congress be notified in an inspector general is removed from his or her position. This does not apply to DCAA.

- c. statutory protections that prevent the audited entity from interfering with the initiation, scope, timing, and completion of any audit;

- d. statutory protections that prevent the audited entity from interfering with audit reporting, including the findings and conclusions or the manner, means, or timing of the audit organization’s reports;

There are arguably statutory protections to prevent interference with a Federal audit in 18 U.S.C. § 1516. However, these provisions are rarely, if ever, enforced against DoD
management officials who interfere in DCAA audits; rather, they are enforced against contractors that interfere in audits.

e. statutory protections that require the audit organization to report to a legislative body or other independent governing body on a recurring basis;

DCAA appears to meet this requirement, as it reports to Congress on an annual basis.

f. statutory protections that give the audit organization sole authority over the selection, retention, advancement, and dismissal of its staff; and

DCAA fails to meet this requirement, as the selection, retention, advancement and dismissal of its staff are subject to multiple other authorities such as the Office of Personnel Management.

g. statutory access to records and documents related to the agency, program, or function being audited and access to government officials or other individuals as needed to conduct the audit.

DCAA fails to meet this requirement. DCAA has no statutory access to records and documents. Its access is purely regulatory (e.g. under the Federal Acquisition Regulations, 48 CFR Chapters 1-99), unlike an inspector general – which has access as a matter of law (see, e.g. the Inspector General Act of 1978, as amended; 5 U.S.C. App. § 6). DCAA is routinely denied access to records that we believe we require to complete our attestation engagements, and we lack the statutory authority to acquire these documents – forcing us to rely on alternative means with varying levels of success.

At bottom, DCAA fails to comply with the primary and alternative requirements, and fails to meet one or more of the final safeguards (recall that GAGAS § 3.30 requires that DCAA meet all of the required safeguards if it does not meet the primary or alternative requirements). Therefore, DCAA is either not an external audit entity to DoD, or it is not independent.

(ii) Internal Auditor Requirements

GAGAS § 3.31 states:

Certain entities employ auditors to work for entity management. These auditors may be subject to administrative direction from persons involved in the entity management process. Such audit organizations are internal audit functions …

As noted above, DCAA is an integral part of the Department of Defense, and reports to the Under Secretary of Defense (Comptroller). DoD Directive 5105.36, Paragraph 3 states:

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The DCAA ... shall perform all necessary contract audits for the Department of Defense and provide accounting and financial advisory services regarding contracts and subcontracts to all DoD Components responsible for procurement and contract administration.

Our primary clients within DoD are the Defense Contract Management Agency, or the various military buying commands. All of our DoD audits are performed on behalf of DoD management. None of our audits are performed on behalf of the contractors we audit. Indeed, as an absolute matter of policy, we do not provide our audit directly reports to the contractors, our audit reports for DoD are always addressed to the contracting officer at DCMS or the buying commands.

Therefore, as also noted initially above, there can be no doubt that we are primarily an internal audit entity for the Department of Defense.

We may qualify as an external audit entity when performing audits for other Federal entities outside of DoD (e.g. NASA, NSF, Department of Energy), but then, as noted above – we are not independent under the external audit entity requirements.

Putting the external audit issues aside for a moment and assuming, arguendo, that DCAA is in fact primarily an internal audit entity, we ought to examine the internal audit entity requirements in GAGAS.

In accordance with GAGAS, internal auditors who work under the direction of the audited entity’s management are considered independent for the purposes of reporting internally if the head of the audit organization meets all of the following criteria:

a. is accountable to the head or deputy head of the government entity or to those charged with governance;

b. reports the audit results both to the head or deputy head of the government entity and to those charged with governance;

c. is located organizationally outside the staff or line-management function of the unit under audit;

d. has access to those charged with governance; and

e. is sufficiently removed from political pressures to conduct audits and report findings, opinions, and conclusions objectively without fear of political reprisal.

(GAGAS § 3.31) (emphasis added)

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DCAA objectively fails to meet the independence requirements in a. above. DCAA is not accountable to the head or deputy head of the government entity (DoD), we are accountable to the third level manager (at best). An excerpt from DoD’s organization chart fully supports this conclusion:

![Organization Chart]

As you can see, the Director of DCAA reports to the Under Secretary of Defense (Comptroller) who is at best the third level of management within DoD. DoD Directive No. 5105.36(6)(a) confirms this conclusion:

In performing assigned functions and responsibilities, the Director, DCAA, shall: (1) Report directly to the [Under] Secretary of [Defense] (Comptroller)/CFO.

Therefore, DCAA objectively fails to meet the independence requirements of GAGAS § 3.31(a).

DCAA also objectively fails to meet the independence requirements of GAGAS § 3.31(b). As noted above, DCAA’s audit reports are always directed to the contracting officer, who is usually in line management. DCAA never directed to the Secretary of Defense or Deputy

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Secretary of Defense. In fact, they are never even directed to the Comptroller. Indeed, the Secretary, Deputy Secretary, and Comptroller are not (with few, if any, exception) directly copied on reports. Furthermore, we 
never provide audit reports directly to those charged with governance of DoD (Congress) or the entities we are auditing (e.g. a contractor’s board of directors). We do have access to Congress, so we arguably meet GAGAS § 3.31(d). However, at the very least DCAA objectively fails to meet the independence requirements of GAGAS § 3.31(b).

Our close ties to the line management functions in both DCMA and the military departments also call into question our compliance with GAGAS 3.31(e), but that issue is secondary here and I will not dwell upon it.

I will postpone discussion of GAGAS § 3.31(e) for later as it fits better at the end of this disclosure report.

Ultimately, DCAA objectively fails to meet two of the criteria for internal auditor independence because we do not report high enough within DoD to protect our independence. This is a classic problem with internal auditors (I speak from authority as a Certified Internal Auditor), addressed by the Institute of Internal Auditors (“IIA”) International Standards for the Professional Practice of Internal Auditing, which explains why GAGAS § 3.31 states that internal audit organizations “are encouraged to use the … IIA … Standards … in conjunction with GAGAS.”

At bottom, DCAA is required as an internal audit organization to comply with all five requirements for internal audit organization independence in GAGAS § 3.31. Because it objectively fails to comply with at least two of the five requirements, DCAA is not independent as an internal audit organization under GAGAS.

Regardless of whether DCAA is an internal audit entity, an external audit entity, or a combination of both – DCAA objectively fails to meet either set of GAGAS independence requirements.

DCAA is an internal auditor for DoD because we report directly to DoD management. DCAA is an external auditor for all of the entities we audit because we exclusively audit non-Federal Government organizations such as public and private for-profit and nonprofit corporations, public and private institutions of higher education, state and local governments, and hospitals. We are an external auditor for our non-DoD clients because we send our reports to their management (not our own) for those audits.

In many ways, DCAA functions much like a Government-wide inspector general. However, unlike the GAO or a state auditor (both of which usually have government-wide authority), DCAA is not separated from the Executive Branch – and is instead wholly beholden to it. In essence, DCAA has become the go-to contract compliance auditors for the entire Federal Government – but our structure causes us not to be independent of any of our clients or DoD management because we all ultimately report to the same person (the President, who is for accounting purposes the CEO of the

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United States), and we do not have adequate safeguards (as defined by GAGAS) in place to protect our independence. For all intents and purposes, that is the end of this discussion.

DCAA is not independent under the GAGAS independence framework as either an external auditor, an internal auditor, or both.

Full stop.

However, because DCAA claims compliance with the AICPA’s Statements on Standards for Attestation Engagements (through its statement in every audit report that it complied with GAGAS), we must also determine whether DCAA complies with the SSAEs.

**(d) AICPA Independence, Objectivity and Integrity Requirements as Applied to DCAA**

Let’s take a moment to take a step back and look at the big picture. DCAA’s structure is strange from an AICPA prospective because of the fact that all of our audits have at least three parties – DCAA, our client (DoD, NASA, etc.), and the audited entity (also our client as defined in the Code). Therefore, it is very easy to assume that as long as DCAA is independent from the audited entity (e.g. a contractor), that we do not need to be independent from our client (e.g. DoD).

This is incorrect for a number of reasons:

DCAA performs most of our audits on behalf of DoD management. Although we do not directly audit DoD, or audit findings can (and often do) have serious implications for DoD management. For example, if we conclude that a major government program did not comply with the Federal Acquisition Regulations, the Defense Contract Management Agency officials with primary responsibility for overseeing the project could be implicated. To put it another way, if we find problems at a contractor, questions are likely to be raised as to why DoD management did not find them first. Thus, DCAA often finds itself in situations where DoD management has its own position on the matter (e.g. whether a contractor complied with the FAR), which may or may not be the same as the contractor’s position. This leaves us wide open to at least the perception of undue influence by DoD management upon our audits. While it is debatable whether it is the Independence Rule or the Objectivity and Integrity Rule (or both) that are violated, a violation of either does not permit us to claim compliance with the SSAEs.

ET § 1.000.010.07 defines a “Client” as:

> Any person or entity, other than the member’s employer, that engages a member or member’s firm to perform professional services and, if different, the person or entity with respect to which professional services are performed.

ET § 1.000.010.03 defines an “Attest Client” as:

> A client that engages a member to perform an attest engagement or with respect to which a member performs an attest engagement.
There is an exception to this general rule for attest services, insofar as independence is not required from an entity engaging a practitioner if that entity is not the entity being audited and that entity is not a “responsible party” (ET § 1.297.010.01 and .02). “The responsible party is defined as the person or persons, either as individuals or representatives of the entity, responsible for the subject matter.” (AT § .11). At first, this may appear to exempt DCAA’s client’s (i.e. Government agencies) from the independence requirements; however, that is not the case for two reasons. First, independence from DoD is still required by GAGAS, as discussed above. Second, in most or all DCAA engagements the client is also a “responsible party”.

AT § 101.12 states:

The practitioner may be engaged to gather information to enable the responsible party to evaluate the subject matter in connection with providing a written assertion. Regardless of the procedures performed by the practitioner, the responsible party must accept responsibility for its assertion and the subject matter and must not base its assertion solely on the practitioner's procedures.

The purpose of DCAA’s attestation engagement are to support a written assertion by the cognizant contracting officer. For example, 48 CFR § 9.103(b) states:

No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility. In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility. (emphasis added)

Thus, when DCAA opines upon whether a contractor’s accounting system is adequate for award of a Government contract, our opinion is to be used by the contracting officer to make a written assertion of his or her own as to whether the contractor is responsible.

The same idea applies to all other DCAA engagements. For example, when auditing a contractor proposal, our opinion is whether the proposal is a suitable basis for negotiating a fair and reasonable price to the Government. Thus, while we are auditing the contractor’s assertion that their proposal is suitable, we are doing so to support the Government’s own required assertion to the same end. Similarly, in our incurred cost examinations we are opining whether the costs submitted to the Government for payment are permissible under the governing rule and law. Again, while the contractor is responsible for submitting an assertion and evidence supporting those costs, ultimate responsibility for the subject matter under audit lies with the Government because the contracting officer is responsible for the subject matter as well insofar as her or she is responsible for paying only costs that are allowable, allocable, reasonable, and in accordance with the terms and conditions of the contract in question.

To put it another way, both our clients (e.g. DoD) and the entity being audited (e.g. a contractor) have an interest in the assertion being examined. Obviously a contractor wants an attest opinion favorable to its interest, but DoD also has an interest in a favorable opinion of contracts it wishes to see awarded, and also an interest in an unfavorable opinion of contracts it does not wish to see.

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awarded. This explains GAGAS’s concern with structural independence, and when read to together with SSAEs and the Code makes it clear that independence under the SSAEs applies both to DoD and to contractors.

This interpretation is strongly supported by the SSAE for compliance examinations (the most common type of examination-level attestation engagement performed by DCAA). AT § 601.15 states:

The responsible party is responsible for ensuring that the entity complies with the requirements applicable to its activities. That responsibility encompasses the following.

a. Identify applicable compliance requirements.

b. Establish and maintain internal control to provide reasonable assurance that the entity complies with those requirements.

c. Evaluate and monitor the entity’s compliance.

d. Specify reports that satisfy legal, regulatory, or contractual requirements.

(emphasis added)

While the contractor is responsible for establishing and maintaining internal control, it is the Government that evaluates and monitors the entity’s compliance for Government contracting purposes. Indeed, the entire point of a DCAA Pre-Award or Post-Award Accounting System Examination is to assist the contracting officer with evaluating and monitoring a contractor’s internal controls. Similarly, on an incurred cost examination, the purpose of our attest services is to determine whether the contractor complied, in all material respects, with the compliance requirements identified by the Government contracting officer. The contracting officer then uses that report to make his or her own determination as to the contractor’s compliance. All of DCAA’s other attest engagements fit into this framework as the purpose of every DCAA engagement is to assist a Government contracting officer in evaluating and monitoring an entity’s compliance with specified compliance requirements (e.g. the Federal Acquisition Regulations, 48 CFR Chapters 1-99). This fact explains why our reports are never provided directly to contractor’s as a matter of DCAA policy, but instead are only provided to the Government contracting officer(s), and other interested Government officials.

Thus, the “client” (the “attest client” and “responsible party” on an attestation engagement) is both the Government department hiring us (e.g. DoD) and the entity being audited (e.g. the contractor).

2 Note: DoD is not an individual DCAA employee’s employer for purposes of this section because the DCAA director has authority to establish subordinate organizational elements, including subordinate staff, under DoD Directive 51035.36(4)(b). Therefore, both DoD and the entity being audited qualify as our client on DoD engagements. On non-DoD engagements, DoD is not DCAA’s client (although it is still in a structural position to influence the engagement) – instead, the Government entity hiring DCAA and the entity being audited are both clients.

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Therefore, at bottom our relationship to DoD creates familiarity, management participation, adverse interest, advocacy, adverse interest, self-review, self-interest, and undue influence threats to DCAA’s independence and also our compliance with the Integrity and Objectivity Rule.

(i) Familiarity Threats

A familiarity threat is “[t]he threat that, due to a long or close relationship with a client, a member will become too sympathetic to the client’s interests or too accepting of the client’s work or product” (ET § 1.000.010.12) (emphasis added). Recall that “client” is both the Governmental entity hiring us, and the entity being audited.

DoD (and most, if not all, of our other client agencies) is heavily involved with the management many of the entities under audit, which creates significant familiarity threats. For example, Lockheed Martin Corporation receives practically all of its revenue from the Federal Government and is a vital part of the national defense infrastructure. At various times in the past, DoD officials have been found to have colluded with various contractors’ management to permit improper activities. At the very least, DoD has a very cozy relationship with many contractor. Indeed, the Defense Contract Management Agency has offices literally inside buildings at several major contractors, for which it pays those contractors rent – putting its officers into constant physical contact with senior contractor personnel. To some extent, such a relationship is necessary and justified; however, the fact that DoD directly controls DCAA arguably causes DoD management’s long association with major contracts to become a familiarity threat for the Agency.

The 2008 GAO report concluded that substantiated findings of misconduct by contractor were removed from DCAA audit reports by order of senior DCAA management. The report concluded that this was due to familiarity threat between DCAA management and the contractors – but did not consider the possibility that the familiarity problem may also exist between DoD management and contractors, and that problem cannot be fixed by something as simple as mandatory auditor rotation (the solution to the 2008/2009 familiarity threat findings) because the threat comes from the relationship between DoD management and DCAA management, not DCAA management and the contractors. Also, senior management (e.g. the Director of DCAA) do not rotate at all.

Therefore, there is a significant threat that DCAA’s familiarity with the entities that it audits at the management level, and also its familiarity with DoD compromises our independence.

(ii) Management Participation Threat

Management participation threat is “The threat that a member will take on the role of client management or otherwise assume management responsibilities, such may occur during an engagement to provide nonattest services” (ET § 1.000.010.13) (emphasis added). Again, we are talking about both DCAA talking on DoD management responsibility (or other “client management” in the context of the entity hiring us) and DCAA taking on management responsibility for a contractor.
DoD Directive No. 5105.36 states that the DCAA Director shall:

**Approve**, suspend, or **disapprove** costs on reimbursement **vouchers received directly from contractors**, under cost-type contracts, transmitting the vouchers to the cognizant Disbursing Officer. (DoD Directive No. 5105.36(5)(d)) (emphasis added)

This is a **management functions**. The Code states

If a member were to assume a management responsibility for an attest client, the management participation threat would be so significant that **no safeguards could reduce the threat to an acceptable level** and independence would be impaired. (ET 1.295.030.01) (emphasis added)

ET § 1.295.030.02(c) states that one of these services is “authorizing, executing, or consummating transactions or otherwise exercising authority on behalf of an attest client or having the authority to do so”, clearly covers the approval and disapproval of vouchers (bills from contractors to the Government for goods and/or services) above, even if that approval is only ‘provisional’.

Indeed, the Code makes this utterly unequivocal:

[T]hreats to compliance with the “Independence Rule” … **would not be at an acceptable level and could not be reduced to an acceptable level** by the application of safeguards, **and independence would be impaired**, if, for example, a member

b. authorizes or approves transactions.

…

e. accepts responsibility to authorize payment of attest client funds, electronically or otherwise …

…

h. approves vendor invoices for payment.

(ET § 1.295.120.03) (emphasis added)

In fact, DCAA routinely provides provisional approval to vouchers from contractors. Our approval causes the voucher to be paid by the Defense Finance and Accounting Service (“DFAS”). Thus, we have approved a vendor invoice for payment, accepted responsibility to authorize payment of funds (albeit indirectly through DFAS), and thereby authorize and
approve the transaction (to be recorded on DoD’s books by DFAS). We must also not ignore the other side of the transaction because we also later audit the costs billed on many of those invoices when we perform audits on the contractors billing costs on those voucher, which will be discussed below under self-review threat. Thus, DCAA performs nonattest services (approval of vouchers – read “vendor invoices”) for the same client that engages it to audit the vendor (i.e. the contractor), and upon the same entity that it will later audit.

Even worse, DCAA approves (as a nonattest service for DCMA) the overhead rates that contractors use to bill the Government on these vouchers. Contractors ordinarily require our approval to bill the Government for overhead costs. Thus, we effectively control both side of these billing transactions. This clearly violates the Independence Rule.

DoD Directive No. 5105.36 also states that DCAA shall:

Provide assistance, as requested, in the development of procurement policies and regulations. (DoD Directive No. 5105.36(5)(l)) (emphasis added)

Our primary criteria for judging contractor compliance on audits are the procurement policies and procedures. Thus, our assisting in developing those procedures for DoD management poses both a management participation threat, and a self-review threat because we are helping to write the very criteria we will later evaluate against a contractor’s practices. Again, the self-review issues will be discussed later.

The Directive also states that DCAA shall:

Providing DoD officials responsible for procurement and contract administration with financial information and advice on proposed or existing contracts and contractors, as appropriate. (DoD Directive No. 5105.36(5)(b)) (emphasis added)

In an advisory capacity, attend and participate, as appropriate, in contract negotiation and other meetings where contract cost matters, audit reports, or related financial matters are under consideration. (DoD Directive No. 5105.36(5)(k)) (emphasis added)

Advising management during contract negotiations compromises our independence because in doing so the Agency becomes management’s partner at the negotiating table, placing our interests as an Agency in potential conflict with our objectivity. This is especially true where a contractor’s position is objectively correct, but DoD’s interests lie in the opposite conclusion.

Therefore, there is a significant threat that DCAA’s participation with DoD management critically compromises its independence.

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Adverse Interest Threat

Adverse Interest is “The threat that a member will not act with objectivity because the member’s interests are opposed to the client’s interests” (ET § 1.000.010.10). An example is when “The client has expressed an intention to commence litigation against the member” (ET § 1.000.010.10(a)). Insofar as DCAA is a part of the Federal Government, DCAA is routinely sued by the entities we audit. For example, when one of our reports forms the basis of a decision not to award a contract, that decision is usually litigated and DCAA’s report is often the center of that litigation. The Government is also often sued when our audits find that a contractor billed the Government for costs not permitted by law, and DoD uses that report to demand payment from a contractor. The opposite is also true. DCAA reports often form the basis of the Government suing the contractor (i.e. our client suing the entity we audited). We are often called to testify at such proceedings, whether initiated by the Government or the contractor – either through the submission of our audit reports, or actual testimony at trial. During such litigation, contractors routinely attack the credibility of DCAA and the integrity of our audits. This gives us a clear adverse interest in the outcome of such litigation.

Even more concerning, DCAA does not disqualify auditors from performing engagements on contractors with which they are involved in litigation. For example, if DCAA is engaged in litigation with a major contractor before the Armed Services Board of Contract Appeals (whether initiated by the Government or the contractor) based on a DCAA audit report, the Field Audit Office Manager (the partner equivalent since he or she signs the report), supervisor(s) and auditor(s) who participated in the report involved in the litigation are permitted (indeed, are required) to participate in other audits of that same entity while the litigation is ongoing. This is clearly a significant adverse interest threat.

Finally, some DCAA auditors are assigned to support criminal investigations directly. These auditors work directly with criminal investigators to provide forensic accounting and/or investigative services, mostly (or entirely) on entities that DCAA is has audited, is auditing, and intends to audit in future. From a purely perceptual level, the fact that DCAA is publically credited when those investigations result in successful criminal prosecutions of contractors is extremely prejudicial to an appearance of independence on our part.

Therefore, DCAA’s participation in litigation either against the Government (or client) or a contractor (the entity we audited) is a significant Adverse Interest Threat. The fact that the same auditors responsible for the report (or reports) at issue in the litigation continue to perform work on other audits at that same contractor poses even more of an adverse interest threat.

ET § 1.290.010.06 states:

... There are situations regarding litigation between covered members and attest clients in which threats to the covered member’s compliance with the “Independence Rule” would not be at an acceptable level and could not

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be reduced to an acceptable level by safeguards and independence would be impaired. Examples of these situations are:

a. An attest client’s present management commences litigation alleging deficiencies in audit work performed for the attest client or expresses its intention to commence such litigation, and the covered member concludes that it is probable that such a claim will be filed.

b. A covered member commences litigation against an attest client’s present management alleging management fraud or deceit.

Again, litigation involving our audits routinely involves allegations of deficient audit work, especially when our work is used to determine whether a contractor owes money to the Government. Further, DoD (and many of our other clients) routinely commence litigation under the False Claims Act and other rule and law alleging fraud or deceit against auditee management. As noted above, DCAA continues to perform audits on such contractors during and after such litigation.

As an even more obvious example, DCAA is currently being sued directly by Kellogg, Brown and Root (“KBR”) for malpractice related to audits we performed on that company. KBR’s allegations are that our audit(s) were so deficient that they lead to improper prosecution of KBR by the Department of Justice. Yet, despite this ongoing litigation that goes to the core of our integrity, DCAA is at this very moment performing audits of KBR.

As such, it appears that our independence is compromised on all such clients, and no safeguard can reduce the threat to an acceptable level. If true, all audit reports on such contractors during (and perhaps after) the litigation in question would be compromised – especially if they were performed by any of the same auditors who performed the audit disputed in litigation. Given that the Government is presently engaged in litigation (or anticipates being engaged in litigation) with most or all of our major contractors and many of our nonmajor contractors, this threat along could compromise the independence of the Agency on hundreds of attest engagements covering billions of dollars of taxpayer money.

(iv) Advocacy Threat
Advocacy Threat is “The threat that a member will promote a client’s interests or position to the point that his or her objectivity or independence is compromised” (ET 1.000.010.11) Because DCAA’s clients include both sides of potential litigation, as noted above under Adverse Interest Threat, when DCAA takes a position in favor of the Government in litigation, we create Advocacy Threat towards one client (the Government) and Adverse Interest Threat against the other (the contractor). Although rare (which is a potential red flag in and of itself), when we take a position against the Government in litigation, we create Advocacy Threat towards one client (the contractor) and Adverse Interest Threat against the other.
Taking a step back, it could be argued that all of DCAA’s audits are forensic accounting or investigative services, insofar as most or all of our reports are designed to support decisions by Government officials that are subject to litigation by either party. Thus, our audit reports are not just audit reports, but also forensic accounting or investigative reports.

Regardless, the fact that DCAA is often involved in litigation as a non-neutral party (usually testifying on behalf of the Government’s interest) creates Advocacy Threats.

(v) Self-Interest Threat

Self-Interest Threat is “The threat that a member could benefit, financially or otherwise, from an interest in, or relationship with, a client or persons associated with the client. (ET 1.000.010.14) (emphasis added). Insofar as DCAA is a part of DoD, we have clear interests in the outcome of litigation against contractors. Further, DoD controls the entirety of our budget, provides the vast majority of our revenue, and also hires (and fires) our Director. Therefore, both the Agency and individual auditors have a clear motivation to ‘make DoD happy’ when performing audits. Making matters even more complex, many DCAA auditors are former members of the armed services – and have close personal connections to the Department of Defense.

Therefore, DCAA appears to have significant Self-Interest Threats associated with its work for DoD because it stands to gain or lose financially collectively in terms of budget and individually in the terms of employment (at least for the Director) based on DoD’s interest.

(vi) Self-Review Threat

Self-Review Threat is:

The threat that a member will not appropriately evaluate the results of a previous judgment made or service performed or supervised by the member or an individual in the member’s firm and that the member will rely on that service in forming a judgment as part of another service.

As noted above, certain nonattest activities undertaken by DCAA appear to create significant Management Participation Threats. For example, DCAA’s approval of vouchers (invoices) from contractor’s on behalf of DoD violates the Independence Rule interpretation on approval of vendor invoices. Additionally, such activities may create Self-Review Threat if they become part of later audits. For example, DCAA incurred cost examinations include reconciliations to and from vouchers, including the same vouchers approved by DCAA for payment. DCAA Post-Award Accounting System examinations include numerous procedures related to vouchers as part of our examination of a contractor’s billing system – and some or all of these vouchers could be ones that we previously reviewed and approved for payment. This creates a clear and significant Self-Review Threat to those later attest engagements.

Our participation in litigation and negotiations also create Self-Review Threats. Once DCAA has taken a position in litigation or negotiations, we may not properly evaluate an issue in a

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later audit that we previously took a position on during litigation or negotiations. To put it another way, DCAA auditors may be disinclined to reconsider a position if DCAA established that position during nonattest services like litigation or negotiation.

At bottom, DCAA’s relationship with DoD (and our other clients) and some of its nonattest services create serious Self-Interest Threats to our independence.

(vii) **Undue Influence Threat**

Self-Interest Threat is:

The threat that a member will subordinate his or her judgment to an individual associated with a client or any relevant third party due to that individual’s reputation or expertise, aggressive or dominant personality, or attempts to coerce or exercise excessive influence over the member. (ET § 1.000.010.16)

This threat is really the end result of all of the threats discussed above. Because DCAA is an integral part of DoD, and fully controlled by DoD management, DoD has a virtually unlimited ability, at least in appearance, to influence DCAA’s activities. DoD management can in many cases determine whether DCAA is even engaged to perform a particular audit, and can choose to proceed on a matter without a DCAA audit report, even if one is already in process.

ET § 1.000.010.23 defines an “Individual in a position to influence the attest engagement” as one who:

a. evaluates the performance or recommends the compensation of the attest engagement partner;

b. directly supervises or manages the attest engagement partner, including all successively senior levels above that individual through the firm’s chief executive;

c. consults with the attest engagement team regarding technical or industry-related issues specific to the attest engagement; or

d. participates in or oversees, at all successively senior levels, quality control activities, including internal monitoring, with respect to the specific attest engagement.

Because the Under Secretary of Defense (Comptroller), a member of DoD management, supervises and evaluates the Director of DCAA, there is no question even under a strict reading of the Code that DoD management is in a position to influence DCAA’s attest engagements.

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Rather than spend too much time on the theory here, I will instead apply the Undue Influence Threat framework here to an actual audit situation later in this disclosure.

(viii) Integrity and Objectivity Rule
ET § 1.100.001.01 states:

In the performance of any professional service, a member shall maintain objectivity and integrity, shall be free of conflicts of interest, and shall not knowingly misrepresent facts or subordinate his or her judgment.

The purpose of this rule is clear: members must come to their own conclusions based on their own professional knowledge, skills, and experience. While a member may seek guidance from others, a member may never substitute another’s judgement for his or her own.

This ties back in many ways to GAGAS. GAGAS § 3.31(e) requires that we be “...sufficiently removed from political pressures to conduct audits and report findings, opinions, and conclusions objectively without fear of political reprisal.” However, the unilateral removal of DCAA Director Stephenson by the Comptroller in 2009 proves beyond any doubt that we are not sufficiently removed from political pressures. Although the removal of Director Stephenson was likely a good thing, the method of her removal (unilateral action by the Comptroller) unequivocally demonstrates that the DCAA Director is constantly under the threat of summary dismissal should his or her decisions prove politically unpopular. We cannot overlook this extremely serious flaw in DCAA's structure simply because the last time it was used resulted in a positive outcome for the integrity of the Agency. The ends do not justify the means.

Thus, DCAA’s position within DoD makes us very vulnerable to undue influences that could cause (and, in my opinion, have caused) us to subordinate our judgment. Again, rather than linger on the theoretical, I will provide an 'example to prove the rule' below.

(c) Case Study – National Ecological Observatory Network Audit
In late 2012, DCAA was engaged by the Office of the Inspector General of the National Science Foundation (“NSF-IG”) to perform an attestation-level examination engagement of the National Ecological Observatory Network, Inc. (“NEON”) – a 100% Government funded nonprofit and the largest current National Science Foundation (“NSF”) project. The purpose of the engagement was to attest as to the compliance of NEON’s accounting system with the governing rule and law. I was the Auditor-in-Charge of the engagement. I had a supervisory auditor above me, and an FAO Manager (partner equivalent as he or she signs the report) above that.

During the course of the engagement, we discovered that NEON had unlawfully billed the taxpayer for $1.8 million in illegal expenditures including alcohol, parties, lobbying, and the like. NEON utilized a mechanism known as a “management fee” to receive payment from the Government for these expenditures. We concluded that the management fee was nothing more than a sham mechanism by which NEON evaded the prohibition against the payment of these cost, and
concluded that it was likely fraudulent. We duly included this finding in our audit report, which was approved by the two levels of management above me (including the engagement partner).

The report would have serious implications for NSF management, which approved the allegedly fraudulent fee. However, unbeknownst to us, DoD management also routinely approved and paid millions of dollars in identical (or virtually identical) fees to many of its own nonprofit grantees and contractors. Therefore, our report would (unintentionally) implicate senior DoD officials in the same misconduct disclosed in the audit report finding on the management fee.

Perhaps as a result of the above, the concurring-partner equivalent (called a Regional Audit Manager) declined to concur with the finding. After over a year of internal dispute (which involved every level of management in the Agency), a direct order was issued in the name of the DCAA Director to the engagement partner, ordering the engagement partner to remove the finding. Because the concurring partner was the direct superior of the engagement partner, and threatened action against the engagement partner’s performance evaluation (which he controlled as the engagement partner’s superior) if the engagement partner did not follow the order, the engagement partner removed the finding and signed the final report – despite the fact that all of the auditors, the supervisor, and the engagement partner stated in writing in the working papers that they disagreed entirely with the decision to remove the finding, and believed the finding was correct. I resigned rather than sign what I believed to be a false and misleading report, and suffered a downgrade to my performance evaluation, amongst other retaliation.

I was ultimately forced to take the matter to the Congress. After a series of Congressional hearings and prime-time news coverage, on 16 April 2015, the White House Office of Management publically concurred with the original audit finding and found that “management fees” cannot be used to evade the cost allowability regulations and pay for alcohol, parties or lobbying.

The summary above is a very simplified summary of the events in the NEON engagement, but will suffice for this discussion. Further details will be available in the report specifically on the alleged misconduct associated with the NEON engagement.

The purpose of this example is to show the impact of the threats to DCAA’s independence, objectivity, and integrity on a real audit. A reasonable person could easily conclude from the facts of the NEON engagement that DCAA management’s decision to remove the substantiated findings related to the management fee to protect senior DoD management. Even if that is not what actually occurred, DCAA’s lack of independence causes reasonable uncertainty as to the propriety of its conduct on the NEON engagement and, thus, on all its attestation engagements.

As a brief aside, the same personnel at DCAA ordered substantiated findings removed from another audit around the same time as NEON, although this time they waited to order the removal until the engagement partner was on vacation in Ecuador. On a purely perceptual level, something is rotten in the State of Denmark.
IV. Nonattest Services

As noted above, DCAA performs certain nonattest services for our Government clients. These include four broad categories: approval of provisional billing rates, provisional approval of public vouchers (vendor invoices), litigation/investigative support, and management consulting.

Performance on nonattest services is recognized as a potentially significant threat to independence when performed for an attest client. All of the nonattest services above have two parties other than DCAA – a contractor, and the Government agency charged with overseeing the area in question. For example, public vouchers involve these two parties – the contractor requesting payment, and the Government agency required to make payment. To put it another way, the contractor is the Government’s vendor, and the voucher is the contractor’s invoice to the Government.

As discussed above, both parties are “responsible parties” for purposes of attest services. Although this is a nonattest service, the responsible party analysis is still helpful here. Using the example immediately above, the contractor is responsible for presenting a proper voucher, and the Government agency responsible for payment (e.g. DCMA) is responsible for evaluating the voucher and approving it for payment. Therefore, the subject matter (the voucher and payment of the same) is the responsibility of both the Government and the contractor.

Therefore, we cannot undertake any nonattest services that would impair our independence towards an “attest client”, which means either the Government and/or a contractor. Because we perform attest services on every client upon which we perform nonattest services, we cannot perform any nonattest service which impairs independence, unless safeguards can be implemented. I address each DCAA nonattest service through this lens below:

- **Provisional approval of public vouchers.**
  Public vouchers are simply invoices from a contractor as vendor to the Government, for payment by the Government. ET § 1.295.120.03 states:

  [T]hreats to compliance with the “Independence Rule” … would not be at an acceptable level and could not be reduced to an acceptable level by the application of safeguards, and independence would be impaired, if, for example, a member

  b. authorizes or approves transactions.

  …

  e. accepts responsibility to authorize payment of attest client funds, electronically or otherwise …

  …

  h. approves vendor invoices for payment.

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Therefore, DCAA cannot approve public vouchers for an attest client (which is every public voucher we review) because by doing so we assume what is properly a management function of the client Government agency, in direct violation of the Code. This also poses a self-review threat when we later audit those costs. Therefore, any DCAA auditor who approves vouchers despite this prohibition has violated that Code. Additionally, as discussed above under attest services, the Agency and its auditors are not independent for attest engagements at that contractor, or for that Government agency.

- **Provisional billing rates**
  Provisional billing rates are indirect (overhead) rates that a contractor uses to bill the Government during a particular time period, before adjusting the rates to actuals at the end of the period. Thus, these rates determine how much a contractor gets paid on each voucher to the Government during the period in question. If DCAA and the contractor in question agree on the provisional rates, no other approval is required. Only when there is a disagreement does DCMA become involved. Therefore, in approving the provisional billing rates, we are approving the amounts to appear on vendor invoices for payment, in violation of ET § 1.295.120.03(h). Again, DCAA cannot approve provisional billing rates for an attest client (which is every provisional billing rate request we review) because by doing so we assume what is properly a management function of the client Government agency, in direct violation of the Code. This also poses a self-review threat when we later audit the contractor's indirect costs. Therefore, any DCAA auditor who approves provisional billing rates despite this prohibition has violated that Code. Additionally, as discussed above under attest services, the Agency and its auditors are not independent for attest engagements at that contractor, or for that Government agency.

- **Litigation & Investigative Support**
  As discussed under attest services above, DCAA’s involvement in litigation and investigative support likely creates independence to our independence. Therefore, the performance of these services on or for an attest client is prohibited.

- **Management Consulting**
  As discussed under attest services above, DCAA’s involvement in consulting on everything from procurement policy to contract negotiations could create impairments to independence, and DCAA must either cease performing such services, or document the safeguards put in place to protect independence.

Therefore, it is apparent that DCAA auditors may not at the very least perform voucher or provisional billing rate approvals without violating the Code.

Additionally, it appears that DCAA has failed to properly document its nonattest services. ET § 1.295.040.01 states:

When a member performs a nonattest service for an attest client, threats to the member’s compliance with the “Independence Rule” [1.200.001] may exist. Unless an interpretation of the “Nonattest Services” subtopic [1.295] under the “Independence Rule” states otherwise,

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threats would be at an acceptable level, and independence would not be impaired, when all
the following safeguards are met:

a. The member determines that the attest client and its management agree to

   i. assume all management responsibilities as described in the “Management
      Responsibilities” interpretation [1.295.030].

   ii. oversee the service, by designating an individual, preferably within senior
       management, who possesses suitable skill, knowledge, and/or experience.
       The member should assess and be satisfied that such individual understands
       the services to be performed sufficiently to oversee them. However, the
       individual is not required to possess the expertise to perform or re-perform
       the services.

   iii. evaluate the adequacy and results of the services performed.

   iv. accept responsibility for the results of the services.

b. The member does not assume management responsibilities (See the “Management
   Responsibilities” interpretation [1.295.030] of the “Independence Rule”) when
   providing nonattest services and the member is satisfied that the attest client and its
   management will

   i. be able to meet all of the criteria delineated in item a;

   ii. make an informed judgment on the results of the member’s nonattest
       services; and

   iii. accept responsibility for making the significant judgments and decisions
       that are the proper responsibility of management.

If the attest client is unable or unwilling to assume these responsibilities (for example, the attest client cannot oversee the nonattest services provided or is unwilling to carry out such responsibilities due to lack of time or desire), the member’s performance of nonattest services would impair independence.

c. Before performing nonattest services the member establishes and documents in
writing his or her understanding with the attest client (board of directors, audit
committee, or management, as appropriate in the circumstances) regarding

   i. objectives of the engagement,

   ii. services to be performed,
iii. attest client’s acceptance of its responsibilities,

iv. member’s responsibilities, and

v. any limitations of the engagement.

There is no evidence that DCAA has properly completed the steps in ET § 1.295.040.01(a) and (b). Further, I requested from my supervisor on 22 April the documentation required by ET § 1.295.040.01(c), and he was unable to provide such documentation. He did provide a memorandum (No. 12-PAS-027(R)) from DCAA management that requires preparation of some or all of the required documentation under GAGAS, but makes no mention of the Code. Further, the memorandum states that DCAA management has already reviewed our common nonattest services and concluded that no impairment to independence exists for those services – and therefore states that DCAA auditors are not to conduct an individualized independence analysis of those services. These instructions represent the blatant subordination of the judgement of those auditors in violation of GAGAS and the Code.

Furthermore, the memorandum concludes “the nonaudit service is to be performed for a third party requestor, not the contractor, and as a result, is not expressly prohibited by GAGAS” – which entirely ignores the Code, and the definition of “attest client” therein. It appears that DCAA is attempting to define the Government agencies that hire us to perform attest and nonattest services as something other than our “client” to avoid the Code’s independence requirements. This is error.

At bottom, there is no evidence that the required documentation is actually being completed for each nonattest service performed. Therefore, any auditor which proceeds with any nonattest service without completing the required steps and documentation requirements set out in ET § 1.295.040.01 has violated the Code. Further, DCAA’s performance of some or all of these nonattest services is improper, and in some cases appears to be entirely prohibited by the Code. Therefore, no DCAA auditor may undertake such nonattest services until they are individually satisfied that these issues have been addressed.

V. Conclusions

In conclusion, it appears that the independence of DCAA is nothing more than a polite fiction, a fiction that has been perpetuated whether through ignorance or malice for decades. In an attempt to create what has become a Federal contract audit agency responsible for a massive range of audits across dozens of Federal departments and agencies, the Department of Defense has created an audit agency that is not independent from anyone in the Executive Branch.

GAGAS § 3.10 states:

For consideration of auditor independence, offices or units of an audit organization, … are not differentiated from one another. Consequently, for the purposes of independence evaluation using the conceptual framework, an audit organization that includes multiple offices or units … is considered to be one audit organization. (emphasis added)
Therefore, for purposes of evaluating compliance with the independence requirements of GAGAS, DCAA as a whole must be structurally independent, of that lack of independence taints every single audit and auditor in the Agency.

While some of the analysis and conclusions above may be subject to legitimate challenge, in the aggregate there is no question in my mind that DCAA violates either/both the Independence Rule and/or the Objectivity and Integrity Rule.

Given the consequences that would arise if the Government’s largest independent audit agency was determined to not be independent after all, it is not surprising that no one wanted to be the first person to point out that the emperor is not wearing any clothes. However, it is that kind of anyone-but-me-should-fix-this-problem attitude that lead to the Arthur Andersen/Enron debacle, and numerous other shameful failures by the profession in the past.

Worse, rather than confront the threats head on and try to address them, DCAA has instead threatened, bullied, harassed and otherwise attempted to intimidate me into dropping these issues. In response to my inquiries regarding the independence of the Agency, DCAA has basically responded that it is not my problem – and that our structural independence is not up for discussion. The only support provided by DCAA is the Contract Audit Manual, which states:

The ability of audit organizations’ in government entities to perform audit work and report the results objectively can be affected by their placement within the Government and the structure of the Government entity audited. DoD Directive 5105.36 (see Supplement 1-1S1) established DCAA as an independent agency of DoD; with the responsibility to perform all necessary contract audits for the Department of Defense. DCAA has been organizationally positioned within DoD to ensure independence from the various DoD departments and agencies involved in the acquisition process. In addition, DCAA performs audits of contractors, not other DoD entities accordingly, an environment exists where DCAA can function in an independent, objective manner in performing its contract audit services.

Given that DoD Directive 5105.36 does not establish us as independent of DoD in any way but, as discussed in detail above, lays out that we are wholly beholden to DoD management through the Comptroller, this statement lacks any support and is nothing more than a tale told by an idiot, full of sound and fury, but signifying nothing. If this is all that DCAA can offer in defense of its independence, then no DCAA auditor can reasonably be satisfied as to our independence.

Ultimately, even if all of my analysis and conclusions above are in error, senior DCAA management’s complete unwillingness to even discuss the matter prior to this disclosure is grossly improper. At the very least, DCAA management must provide a reasonable explanation in response to these concerns to establish that it is, in fact, fully in compliance with the Independence Rule and the Integrity and Objectivity Rule. Its failure to do so is telling. Auditors cannot simply accept the independence of their employer on faith, they must have sufficient evidence of independence to satisfy themselves personally, before they can begin work on an attestation engagement. To do otherwise is professional misconduct of the highest order.

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3 My apologies to Shakespeare for stealing and paraphrasing a good line from Macbeth.
Therefore, regardless of whether my analysis and conclusions herein are correct, my belief in their validity is sufficient to trigger my obligation as a Certified Public Accountant in the State of Colorado, member of the AICPA, and servant of the people of the United States to report this matter for your consideration and to refrain from performing attest and/or prohibited nonattest services for DCAA until my concerns are reasonably satisfied. If I worked on the attest and nonattest services assigned by the Agency, I would be in violation of the Code. Further, if I signed the Working Paper 34 Statement of Independence, I would be signing a false statement to the Federal Government in violation of law (e.g. 18 U.S.C. § 1001). Therefore, my refusal to obey the order to work on those assignments is consistent with 5 U.S.C. § 2302(b)(8)(A).

Additionally, Agency management's failure to address these threats long before I joined the Agency represents gross mismanagement of extraordinary proportions. The Merit System Protection Board defines “gross mismanagement” in as management action or inaction which creates a substantial risk of significant adverse impact on the agency’s ability to accomplish its mission. White v. Department of the Air Force, 95 M.S.P.R. 1, ¶ 29 (2003), aff’d, 391 F.3d 1377 (Fed. Cir. 2004). If I am correct in any of my material conclusions above, DCAA will be unable to produce any attestation reports in compliance with GAGAS, the SSAEs, and the Code until the issues are resolved. Given that the production of these audit reports are the primary purpose for the Agency’s existence and the foundation of its mission, there is no doubt that this would constitute “gross mismanagement”.

Finally, the Agency’s repeated attempts to determine the independence of individual auditors for those auditors on many critical issues (e.g. nonattest services), and thereby subordinating their judgement by not permitting auditors to evaluate their own independence, represents a shocking abuse of authority. An abuse of authority requires an “arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons.” D’Elia v. Department of the Treasury, 60 M.S.P.R. 226, 232 (1993). Since every auditor has the right (and, indeed, the obligation) to determine independence for themselves, depriving them of that right is arbitrary and capricious. Further, ordering auditors to disregard their obligations under GAGAS, the SSAEs, and the Code on at least some aspects of some engagements is equally improper. Retaliation against employees (like myself) that question these actions also constitutes an abuse of authority.

Therefore, it is apparent that DCAA’s failure to address these independence threats pose a clear and present danger to the Agency’s compliance with Generally Accepted Government Auditing Standards, the Statements on Standards for Attestation Engagements, and the Code of Professional Conduct. If it is ultimately determined that the Agency failed to comply with these professional standards, the it is entirely possible that every single attest and nonattest services performed during the period of noncompliance is improper. This would fundamentally undermine the Agency’s mission, and bring into question every procurement action (including litigation) that occurred during the period of noncompliance in which DCAA’s attest reports and nonattest services played a material role.

To be honest, I hope that my conclusions above are in error – because the consequences if I am right will be catastrophic to the Government; but until someone proves me wrong I am given a choice between doing nothing and keeping my job, or doing something and most likely losing it. Given such a choice between what is right, and what is easy – I can only try to do what I believe is right and stand by my guns on this matter.
Finally, please note again that this disclosure should be read in the context of the second disclosure dated 27 April 2015 addressing the NEON engagement (and others) specifically, as the overall context is vital to understanding my prospective on the matter.

Respectfully submitted,

J. Kirk McGill

Mr. Joshua Kirk McGill - CPA, CFE, CIA, CMA, CISA, Cr.FA, CFC, CGAP, CGMA; M.S. Acct.
Senior Federal Auditor
United States Department of Defense
Certificate Of Service

e-Appeal has handled service of the assembled pleading to MSPB and all of the Parties.

Following is the list of the Parties in the case:

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<td>General Counsel Agency Representative</td>
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